TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 100

GILBERT GREEN AND HENRY WINSTON,
PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 9, 1957
CERTIORARI GRANTED MAY 27, 1957

SUPREME COURT OF THE UNITED STATES

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[fol. A] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Petitioner,

v.

GILBERT GREEN, Respondent.

ORDER TO SHOW CAUSE—Filed February 28, 1956

Upon the annexed affidavit of PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, it is

ORDERED that the above-named Gilbert Green show cause at a term of this Court, to be held on March 12, 1956, at 10:30 A.M., in Room 318, United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, or as soon thereafter as counsel can be heard, why the said Gilbert Green should not be adjudged and held in criminal contempt of this Court by reason of the fact that he knowingly and deliberately disobeyed and resisted a lawful order and command of this Court directing him to appear before it on July 2, 1951 and July 3, 1951, requiring him to surrender himself in execution of the judgment and sentence imposed under Indictment C 128-87 upon such day as the District Court may direct.

Sufficient cause therefor appearing, let the service of a copy of this order upon the respondent, on or before February 28, 1956, be deemed sufficient.

Dated: New York, N. Y., February 27, 1956.

John W. Clancy, U.S.D.J.

[fol. B] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF PAUL W. WILLIAMS

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

PAUL W. WILLIAMS, being duly sworn, deposes and says:

I am United States Attorney for the Southern District of New York and am in charge of the above entitled proceeding and familiar with all facts and prior proceedings herein.

This affidavit is submitted in support of an order directing respondent to show cause why he should not be cited and punished for criminal contempt of Court by reason of his knowing and deliberate disobedience and resistance to a lawful order and command of the United States District Court for the Southern District of New York.

Green and ten others were convicted of conspiracy to teach and advocate the overthrow of the Government of the United States by force and violence in violation of the Smith Act, Sections 11 and 13, Title 18, United States Code (1946 Ed.). Judgment of conviction and sentence was entered in October, 1949, sentencing respondent to a term of five years imprisonment and a fine of $10,000.

[fol. C] On November 9, 1949, respondent Green was admitted to bail in the sum of $20,000, pending appeal from the aforesaid conviction, by order of the United States Court of Appeals for the Second Circuit, dated November 2, 1949. Respondent's admission to bail was conditioned on his agreement to "surrender himself in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct . . .", and not to "depart the jurisdiction of the District Court for the Southern District of New York without leave. . . .".

On June 4, 1951, the Supreme Court of the United States affirmed the judgment of conviction and sentence (341 U. S. 494). On June 22, 1951, Mr. Justice Jackson, Circuit Jus-

tice for the Second Circuit, denied an application to stay the mandate of the Supreme Court.

On or about June 28, 1951, a proposed order on mandate, requiring the surrender of Green and his co-defendants on July 2, 1951, was served on counsel, and Green and his co-defendants were notified to be present on July 2, 1951 for said purpose.

On said July 2, 1951, respondent failed to appear before this Court. On that date, Honorable Sylvester J. Ryan of this Court signed an order requiring the surrender of respondent Green on July 2, 1951, at 11:05 A.M. Respondent did not surrender at the time fixed or at any other time. On July 2, 1951, a bench warrant for Green's arrest was ordered by Judge Ryan and the proceeding adjourned until July 3, 1951. On this date, Green again failed to appear before the Court.

[fol. C] On information and belief, the United States Marshal for the Southern District of New York was unable to execute the warrant of arrest prior to February 27, 1956.

On February 27, 1956, respondent Green surrendered himself for commitment at the United States Court House Foley Square, New York, New York.

Upon information and belief, respondent Green well knew of the outstanding order and decree of this Court and was in wilful and deliberate disobedience and resistance to said lawful order and decree of this Court referred to herein and was, therefore, in criminal contempt of this Court and its authority.

The conduct of Green in defying and flaunting the lawful order of this Court directing his surrender is an open affront to the dignity of the Court. He had been accorded every right of review to test the validity of his conviction. After the Supreme Court had ruled his conviction valid, respondent then flouted the judicial process by his deliberate and continued defiance of a known order of this Court.

The affront to the dignity of this Court should not go unpunished, and this proceeding is initiated in accordance with the mandate of Section 401(3), Title 18, United States Code, which gives this Court full power to punish such criminally contemptuous conduct.

WHEREFORE, it is respectfully prayed that this Court enter an order requiring the respondent, Gilbert Green, to appear in this Court on a day certain and show cause [fol. D] why he should not be held in and adjudged guilty of criminal contempt of this Court for his disobedience and resistance to its lawful order, decree and command, and after said hearing, that he be punished for such contumacious conduct.

Paul W. Williams, United States Attorney for the Southern District of New York.

Sworn to before me this 27th day of February, 1956.

Jack W. Ballen, Notary Public, State of New York, No. 24-0146400, Qualified in Kings Co., Cert. Filed in New York Co., Commission Expires March 30, 1957.

[fol. E] UNITED STATES MARSHAL'S RETURN

(omitted in printing).

[fol. F] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SPECIFICATIONS OF CRIMINAL CONTEMPT GREEN CASE—
Filed March 6, 1956

This proceeding having been instituted by an order to show cause dated February 27, 1956, based upon an affidavit of Paul W. Williams, United States Attorney for the Southern District of New York, sworn to on February 27, 1956, and heretofore served on the contemnor on February 28, 1956,

The United States of America, for its specifications of criminal contempt, alleges that the contemnor, Gilbert Green, has committed criminal contempt of this Court by wilfully and knowingly disobeying and resisting the following order, decree and command of this Court:

Order of Hon. Sylvester J. Ryan, United States District Judge, dated July 2, 1951.

The United States of America further alleges that said contemnor, Gilbert Green, committed criminal contempt of this Court by reason of the following:

The contemnor disobeyed the said order of said Judge Ryan by failing to appear before this Court on July 2, 1951, by failing to surrender to the United States Marshal [fol. G] for the Southern District of New York on said date, or at any time prior to his surrender at the United States Court House on February 27, 1956.

A true and accurate copy of the said order of Judge Ryan is attached hereto and incorporated herein as if fully set forth.

Dated: New York, New York, March 6, 1956.

Yours, etc.,

Paul W. Williams, United States Attorney for the Southern District of New York, Office and Post Office Address: United States Court House, Foley Square, New York 7, New York.

[fol. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. 149-268

UNITED STATES OF AMERICA,

v.

GILBERT GREEN.

Excerpts from Stenographer's Minutes in Green Case

Before:

Hon. Archie O. Dawson, District Judge.

New York, March 12, 1956, 10:30 o'clock a.m.

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, and Thomas A. Bolan, Esq., Assistant United States Attorney; for the Government;

John J. Abt, Esq., Attorney for the Defendant.
[fol. 2]

* * * * * * *

The Court: You have a motion to make?

MOTION TO VACATE SHOW CAUSE ORDER AND DENIAL THEREOF

Mr. Abt: Yes; your Honor, at this time I move to vacate the show cause order and to dismiss the proceeding on the following ground: the charge here is that the respondent is in disobedience of an order of this court requiring him to surrender for commitment and to serve the sentence [fol. 3] imposed on him in United States vs. Dennis. It is our position, your Honor, that a Federal Court lacks jurisdiction to sentence in contempt for failure to surrender for commitment.

* * * * * * *

[fol. 6]

* * * * * * *

The Court: Your motion is denied. All of the points you made were urged in the case of United States of America v. Gus Hall, and passed upon by the Court of Appeals of this circuit. I think it is 189 Fed. (2d) at 726, certiorari was denied by the United States Supreme Court, 345 U.S. 906, and as to the suggestion that all that happened to a person who does submit to sentence following conviction, I think the point made by Judge Ryan in all the cases is a good one, but a rule that would permit that to be done would be simply a matter of convenience for a person who had means and a matter of indifference where bail had been posted by others. The power of the court to sentence for contempt under the circumstances shown in the specifications here has been determined by the court. Therefore it is a question of fact as to whether [fol. 7] these specifications are sustained.

* * * * * * *

[fol. 11] OFFERS IN EVIDENCE

Mr. Williams: I offer a certified copy of judgment of conviction and sentence, dated October 21, 1949, sentencing Green to five years imprisonment and $10,000 fine.

The Court: Any objection?

Mr. Abt: No objection.

(Marked Government's Exhibit 1 in evidence.)

Mr. Williams: I offer a certified copy of the order of the Court of Appeals, granting bail November 2, 1949.

Mr. Abt: No objection.

(Marked Government's Exhibit 2 in evidence.)

Mr. Williams: Your Honor doesn't wish me to read any parts of these?

The Court: No, no.

Mr. Williams: I offer a certified copy of the bail bond recognizance, dated November 3, 1949.

Mr. Abt: No objection.

(Marked Government's Exhibit 3 in evidence.)

Mr. Williams: If you wish to see any of these, Mr. Abt, I will pass them to you first.

I offer a certified copy of the order and affidavit of Judge Bondy, dated November 10, 1949, extending the bail limits:

[fol. 12] Mr. Abt: No objection.

(Marked Government's Exhibit 4 in evidence.)

Mr. Williams: I offer this certified copy of the order of Judge Ryan, directing the surrender of Mr. Green on July 2, 1951.

Mr. Abt: May I see that just a moment? No objection.

(Marked Government's Exhibit 5 in evidence.)

Mr. Williams: I offer a certified copy of the bench warrant for the arrest of Green dated July 2, 1951.

Mr. Abt: No objection.

(Marked Government's Exhibit 6 in evidence.)

Mr. Williams: Now I ask the Court to take judicial notice of three facts:

One, decision of Mr. Justice Jackson of the Supreme Court of the United States, continuing bail pending appeal after affirmance of conviction by the Court of Appeals. This is in 184 Fed. (2d) 280.

Second, a decision of the Supreme Court of June 4, 1951, affirming a judgment of conviction which appears in 341 U. S. 494.

And third, the decision of Mr. Justice Jackson of June 22, 1951, denying a stay of the mandate, appearing in 117 [fol. 13] Fed. Supp. 685.

Now, if your Honor please, I subpoenaed Mr. Sacher and al[illegible] Mr. Isserman, but to avoid calling them counsel has agreed that I may read into the record the record of what transpired before Judge Ryan on July 3, 1951, because that was the only purpose of my subpoenaing these gentlemen.

Mr. Abt: It is quite all right, Mr. Williams.

The Court: Can't that be taken in lieu of the evidence with the same force and effect as if they appeared here today and testified?

Mr. Abt: Yes, I stipulated that had they appeared they would so testify, your Honor.

The Court: And there will be no further cross examination than appears in the record.

Mr. Abt: Yes.

The Court: All right.

Mr. Williams: On page 89 of the transcript of the record which I have before me, in United States of America v. Eugene Dennis, et al., C-128-87—this is before Judge Ryan——

"Now, you did make a statement"——

The Court: This is Mr. Sacher?

Mr. Williams: This is the Court speaking to Mr. Sacher. [fol. 14] The Court: All right. That is Harry, or which Sacher?

Mr. Williams: Harry.

The Court: Harry Sacher.

Mr. Williams: Sacher.

"Now, you did make a statement last week that you will have the four defendants in court, as I recall, on Monday.

"Mr. Sacher: I said that all of them would be here.
"The Court: I assume by 'all,' you meant the eleven.
"Mr. Sacher: Yes, your Honor, I did.
"The Court: Including these four."

Now we have to identify "these four", parenthetically: Hall, Thompson, Green and Winston.

Mr. Abt: I so stipulate, your Honor, that those are the four referred to.

The Court: All right.

Mr. Williams: "Mr. Sacher: That's right.

"The Court: And as you know, four of them were not here on Monday. Of course, you may be bound by some obligation of attorney and client, but are you able to give [fol. 15] the Court any information as to their present whereabouts?

"Mr. Sacher: Your Honor, I should consider myself not bound by any obligation to withhold any information that I might have, and I give your Honor my assurance that I have no knowledge, I have no basis of knowledge as to their present whereabouts or where they might have gone.

"The Court: Where did you last see these four defendants?

"Mr. Sacher: I have a definite recollection of having seen Hall and Winston and maybe Green—who is the fourth?

"Mr. Cohn: Thompson.

"The Court: Thompson.

"Mr. Sacher: —Thompson. I am not certain about Thompson, but I am fairly certain that I saw the three I mentioned sometime on Friday at 35 East Twelfth Street.

"The Court: Did you tell them at that time that their presence was required in court yesterday morning?

"Mr. Sacher: Definitely. As a matter of fact I advised that because I think I saw them among other defendants after I had been here on Friday, your Honor, and had made [fol. 16] these motions, and therefore I advised that they all should be present and I was assured they would be.

"The Court: By them?

"Mr. Sacher: Yes, by all of the defendants.

"The Court: That is, that all defendants would be here.

"Mr. Sacher: That's right.

"The Court: But you don't know where they are?

"Mr. Sacher: Really don't.

"The Court: And you personally told them to be here Monday and they assured you that they would be here, with the exception of the one defendant, Green?

"Mr. Sacher: No, Thompson.

"The Court: Thompson.

"Mr. Sacher: I didn't see Thompson on Friday. That is my best recollection, that I didn't see him. I may have."

Now I will turn to Mr. Isserman's testimony. This is on page 91, following immediately the testimony that I have just read or the statements that I have just read:

"The Court: Mr. Isserman, do you know where any of these defendants are?

"Mr. Isserman: I might say to the Court that I would [fol. 17] not rest on privilege in this situation at all. I have no knowledge of the present whereabouts of any of these defendants. I was with Mr. Sacher on Friday when there was some discussion of the illegality or the alleged illegality of the notices that were served, and I recall Mr. Sacher saying that notwithstanding that, he would recommend strongly that all defendants be present on Monday morning, and such assurance was given. I remember, Green being my client, I remember distinctly that I saw him on that day and received from him the assurance that he would be here Monday morning."

Now I skip to page 96. This is Mr. Sacher speaking to the Court.

The Court: On what day is this?

Mr. Williams: July 3rd, 1951, the day following Judge Ryan's order:

"The Court realizes, of course, that the only basis on which I could make my statement or promise"——

I am sorry, this is Mr. Sacher speaking to the Court.

"The Court realizes, of course, that the only basis on which I could make my statement or promise to the Court was the promise of my clients and the others to appear. I don't seek any refuge here beyond the fact that I was [fol. 18] attorney only for three, for the fact is that many

more than three spoke to me this past week and that all said they would be here.

"So confident was I in the belief that they would all be here, that when I spoke to Mr. Saypol, and when we came downtown before your Honor last week, all I asked him for, as he correctly says, was to allow these men to spend the last holiday, which would be available to them for some years, to being with their wives and children, and he may consider it ironical, but I suggested to him that it would be ironical for the United States Attorney to decline that kind of a last wish, so to speak, on the eve of Independence Day.

"When he suggested that we come before your Honor, I had, frankly, as your Honor will recall, it was my impression that this was a matter that would be discussed in chambers and that it would be disposed of that way, and your Honor said that you didn't consider such matters in chambers, and I, of course, deferred, as I was required to, to your Honor's wish."

Mr. Abt: Have you finished your reading?

Mr. Williams: Yes, I have finished.

Colloquy Between Court and Counsel

Mr. Abt: If your Honor please, while I stipulated the fact of these statements, I should like the record to show [fol. 19] my objection as to their relevancy and materiality.

The Court: You will admit that the witness, if he were called, would testify and that would be the extent of his testimony.

Mr. Abt: That is correct, and I reserve my objection as to the relevance and materiality of that testimony.

The Court: The objection is overruled.

Mr. Williams: The Government would like to call to the witness stand, Mr. David Sweeney, the Clerk of this Court.

Mr. Abt: If Mr. Williams wants to prove by Mr. Sweeney that Mr. Green did not appear on July 2nd or July 3rd, I will be happy to stipulate that.

Mr. Williams: May I read what I propose to elicit from Mr. Sweeney, and if it is agreeable to you he will be considered to have testified to that effect.

The Court: All right.

Mr. Williams: Mr. David Sweeney, if called, would testify as follows:

"I am a deputy clerk in the office of the Clerk of the United States District Court for the Southern District of New York, and have been so employed for the past twenty-five years.

[fol. 20] "On July 2nd and July 3rd, 1951, I was assigned to the Criminal Calendar part in Room 318, United States Court House. On the calendar for July 2nd, 1951, there appeared the names of eleven defendants under indictment No. C-128-87, for surrender. Included among those named was the name of Gilbert Green.

"When the matter was reached in the calendar call, I called out the names of the eleven defendants and when I called Gilbert Green there was no response. Mr. Green did not appear for surrender on July 2nd and the Court issued a bench warrant for his arrest and adjourned the proceedings until July 3, 1951.

"On July 3, 1951, the matter of Gilbert Green appeared on the criminal calendar for surrender. Again Green did not appear in answer to the calendar call. On that date Judge Ryan declared Green's bail forfeited."

The Court: Will you stipulate——

Mr. Abt: I will stipulate beyond the fact that Mr. Sweeney would so testify, your Honor. I stipulate that what Mr. Williams has just read are the facts.

The Court: All right.

Mr. Williams: Thank you.

I would like to call Mr. Thomas M. Farley, Chief Deputy United States Marshal.

[fol. 21] Mr. Abt: We can do the same thing again, your Honor. I assume Mr. Williams wants to show——

Mr. Williams: They looked for him and were unable to find him.

Mr. Abt: Were unable to serve the bench warrant.

Mr. Williams: May I read what the testimony will be?

Mr. Abt: I will stipulate that the marshal made diligent effort to serve the bench warrant and was unable to serve it.

The Court: Do you want anything more than that in the record? Do you want where they looked for him?

Mr. Williams: They looked for him and couldn't find him; made diligent efforts to find him and he was not available anywhere.

Mr. Abt: They couldn't——

The Court: Where did they look for him?

Mr. Williams: At his home, 45-18 42nd Street, Long Island City, New York. He was accompanied by two other marshals.

Mr. Abt: That wasn't his home, Mr. Williams. His home is in Chicago.

Mr. Williams: Yes, that is right, his home is in Chicago. [fol. 22] The Court: That is where they looked for him. All right, is it stipulated that that is the fact?

Mr. Abt: It is stipulated that is the fact, your Honor.

The Court: All right, the marshal looked for him at that address.

Mr. Williams: I would like a stipulation that that was the address he gave in the bail bond.

Mr. Abt: I will so stipulate.

Mr. Williams: All right. Thank you.

The Court: All right.

Mr. Williams: Now I am prepared, your Honor, to call the photographer, and I would like to show this film. Robert E. Daly.

Mr. Abt: I would like to inquire, your Honor, as to the relevance, if I may, of this performance we are about to have. I, of course, am prepared to stipulate, as the order to show cause alleges, that Mr. Green surrendered at the court house here in Foley Square on, I believe, the 27th of February, this year.

I don't think we have to have that proved by a moving picture.

The Court: There is the issue, I take it, as to whether he had knowledge of the fact of the order requiring him [fol. 23] to surrender previous to that date.

Is that the issue you are making?

Mr. Abt: That is an issue, yes, your Honor, but a picture showing him mounting the steps of Foley Square is not going to do anything more than I am prepared to stipulate right now.

Mr. Williams: Your Honor, it is not only what you see on the screen, but it is what is said contemporaneously with these acts, and clearly, in his own words and by his own admissions, he indicates that he was a fugitive, that he knew he was a fugitive, and he was returning.

Mr. Abt: May I suggest this, Mr. Williams: do you have a transcript of what Mr. Green said at Foley Square?

Mr. Williams: What is the objection to seeing this film?

The Court: I will take the evidence. There is an issue as to whether he was intentionally remaining a fugitive from justice. I will take any evidence that has any relevance, so you may proceed, Mr. Williams.

Mr. Abt: May I ask one question, your Honor? How do we get all this in the record?

Mr. Williams: Your Honor, we have prepared all of that. [fol. 24] The Court: If there is some film going to be offered, it will be marked in evidence.

Mr. Williams: Now I will let Mr. Bolan call—what is the name of the photographer—Mr. Robert E. Daly. Will you examine him now:

The Court: Mr. Daly.

Mr. Abt: Again I think we can save time, your Honor. I am not objecting to the authenticity of the picture.

The Court: We will swear this witness, anyway, and it will only take a minute.

ROBERT E. DALY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Abt: Again, may I suggest, Mr. Bolan, if you will tell me what you want to prove, which I assume is to——

The Court: Let's ask him. He can do this in about three questions. It will save time.

Direct examination.

By Mr. Bolan:

Q. What is your occupation, Mr. Daly?
A. Motion picture camera man.

Q. How long have you been employed in that occupation?
[fol. 25] A. Twenty-two years.
Q. Do you know the defendant Gilbert Green? Have you ever seen him?
A. I do not.
Q. Well, did you see him?
A. I only saw him the day that I made the pictures.
Q. And do you recall what day that was?
A. I believe it was September—February 27th it was.

The Court: Of this year?
The Witness: Of this year.

Q. And on that day did you take some motion pictures of Mr. Green?
A. Yes, I took newsreel shots of him surrendering on the courthouse steps.
Q. Do you have with you the film that you took on that day?
A. Yes.

Mr. Williams: I offer it in evidence.
The Court: Mark it for identification.
Mr. Williams: Mark it for identification.

(Marked Government's Exhibit 7 for identification.)

Mr. Bolan: Your Honor, I now request permission to exhibit this film.
The Court: Go ahead.

* * * * * * *

[fol. 26]

* * * * * * *

(A motion picture was then projected on the screen and [fol. 27] the following dialogue recorded:)

DIALOGUE OF RECORDED FILM

"Q. Mr. Green, can you tell us why you decided to give yourself up?
"A. Because I think the political climate in the country is changing. I think there is a good chance now of winning the fight to defend the Bill of Rights and the Constitution and to preserve world peace.

"Q. Isn't it true that even though the Communist line may have changed, that ultimately the Communists are still interested in world revolution?

"A. The Communists are interested in Socialism but they are interested in establishing it through the medium of the majority of action of the people.

"Q. Have they done that in any country in the world?

"A. Yes, they have.

"Q. In what country?

"A. In every country in which there is Socialism it is a Socialism supported by the majority of the people. The American path of Socialism is a path which will be determined by the American people and not be identical with the path of people in any other country.

"Q. You don't think that there will be violence as there was in every other country where Communism was established?

[fol. 28] "A. If you mean whether the Communists will instigate violence, there will not be—although that's a long way off—if any violence is to ensue in America it will be the violence perpetrated by the reactionary forces, not by the progressive forces, not by the people, and least of all by the Communists.

"Q. In other words, the only time that the Communists ever engage in violence, you say, is when other people—doesn't that sound like a pretty good excuse, though? I mean, you can always use violence and say that the other guy stirred you up to it.

"A. Well, it's as good an excuse as Abraham Lincoln used in defending the Union from the slavocracy and its attempt to overthrow the Union."

• • •

"A. Will somebody distribute it for me?

"Q. All right, Mr. Green——

"A. And this is still my favorite newspaper.

"Q. Where were you during these five years?

"A. I was in Peoplestown, U.S.A. Where Peoplestown is you will have to determine for yourself. It was north of the Rio Grande and south of the Canadian border.

"Q. But you don't want to be more specific than that?

"A. That's correct.

[fol. 29] "Q. Were you in touch with your family during these five years?

"A. I was not in touch with my family during the five years.

"Q. Have you seen Mr. Winston, the remaining fugitive, during this time?

"A. I have been on my own.

"Q. Mr. Green——

"A. It's been a warm winter, too.

"Q. Mr. Green, can you tell me this—oh, could you get out of the way—cut it. Cut it.

"Hang on for just a second. Will you fellows let us get this, please. Will you please let us get this?

"Now, yes, yes, yes. O.K, let's go.

"Go ahead. Ready. O.K.

"Q. Mr. Green——

"Ben, Ben.

"I'm sorry.

"That's all right, just a piece of recording equipment.

"Q. Mr. Green, Mr. Green—

"A. I believe that was the best way to indicate to the country that it was necessary to resist the trend of Mc-[fol. 30] Carthyism and towards world war.

"Q. Does your turning yourself in have anything to do with the New Look in Moscow?

"A. It has nothing to do with the New Look in Moscow. It has a lot to do with the New Look all over the world and the fact that the world's people have helped to bring about a state of affairs in which peace is now possible.

"Q. Well, did you give yourself up at this time because you think that it may be easier on you?

"A. No, my personal considerations were not involved at all, although I do have a great deal of confidence in the American people and in the fact that the trend which is now setting in will mature and that long before my prison term is up that the prison gates will open and there will no longer be any political prisoners in the United States.

"Q. Do you mean there is a softer feeling now towards Communism; is that what you mean?

"A. I think there is a realization of the fact that the country had been at the brink of war and at the brink of

Fascism and there is an intense desire on the part of the people to prevent this country from going over those brinks. [fol. 31] "Q. Do you expect an additional penalty for having jumped bail?

"A. You'll have to speak to Mr. Brownell on that score.

"Q. What do you intend to do when you leave this place here, I mean, walk those steps; who are you going to see?

"A. I intend to go to the United States Marshal's office.

"Q. Do you expect clemency?

"A. I expect nothing.

"Q. Would you supply information about Winston if it would lessen your sentence?

"A. If I knew where Winston was I would not tell you where he was anyway.

"Q. Have you seen him during the five years?

"A. I have been on my own.

"Q. What made you jump bail?

"A. I've tried to tell you that before. I thought that was the way by which I as an individual could do my best to help the cause for peace and democracy.

"Q. Sir, what did you do during those five years?

"A. I worked.

"Q. What did you work as?

[fol. 32] "A. I worked, political work. I just finished a very important book.

"Q. Who paid you for it?

"A. I was a man who came for dinner.

(Question not recorded on sound track.)

"A. Because I've just completed a very important book.

"Q. Mr. Green, do you think— Mr. Green, do you think it is a good policy——

"Are you O.K.?

"Mr. Green, do you think that it is a good policy to follow for people who feel that they have been unjustly treated in the courts to take the law into their own hands and jump bail?

"A. I am not ready to generalize on that. I'd say that the best kind of policy for the nation would be to live up to its own constitutional Bill of Rights and not to sentence men and women unjustly.

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[fol. 33] Mr. Abt: Yes, your Honor. Now that we have witnessed this exhibition I would move for it to be stricken, and I would like to state very briefly why.

. . . . . .

[fol. 34] The Court: Some of the comments made by Mr. Green in that picture—they are made, I think there is no dispute—would be relevant in showing that he recognized that he was evading the order of this court, and it is from that standpoint that I will receive it in evidence.

. . . . . .

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Williams: Now, if your Honor please, I propose—and you can say at the end if you stipulate to this or not—I propose to call Mr. Gabe Pressman, who is a roving reporter for WRCA-TV, who would testify that he was present on February 27th, 1956, at the foot of the steps of the United States Courthouse, and that he interviewed Mr. Green.

The Court: Is he the man in the motion picture?

Mr. Williams: He is the man in the picture. He would testify that he recognizes Mr. Green, the defendant in [fol. 35] this case, that he interviewed Mr. Green and that the following questions and answers were made either by him or by reporters in his presence of Mr. Green, and are duly recorded on this showing.

The Court: All right.

Mr. Williams: And I would like to——

The Court: Show that to Mr. Abt.

Mr. Williams: I will show it to you because there is no sense in repeating what you just heard on the screen.

Mr. Abt: I will stipulate that the witness would so testify, your Honor, and I further stipulate that the document which Mr. Williams has just handed me is a true, complete, accurate transcript of the sound track of the film we have just witnessed.

. . . . . .

[fol. 36]

. . . . . .

Mr. Abt: No objection. We will stipulate that this docu-
[fol. 37] ment is an accurate transcript of the sound track.

Mr. Williams: And that the witness Pressman heard Mr. Green make these statements?

Mr. Abt: Yes, of course.

The Court: All right. It is received in evidence then.

. . . . . .

[fol. 38]

. . . . . .

Mr. Williams: All right. I am going to call this witness to say that this paper, which is this statement which was signed "Gil Green," was received by INS on February 24, 1956, and was turned over to the FBI.

Mr. Abt: I so stipulate, Mr. Williams, and I will go beyond that, if you care to; and will stipulate that the signature that appears on the press release is the signature of Mr. Green, and it is an authentic——

Defendant Green: May I see that?

Mr. Abt: Yes. This signature is authentic.

Mr. Williams: That saves me calling a handwriting expert by the FBI who would identify this signature as the signature of Mr. Gil Green.

The Court: All right then this witness is excused.

(Witness excused.)

The Clerk: Any objection to this being received?

Mr. Abt: Your Honor, I don't like to repeat it every time. I make a continuing objection as to the relevance of these exhibits but not as to their authenticity.

[fol. 39]

. . . . . .

(Mr. Williams reads Government's Exhibit 9.)

Mr. Williams: The Government rests.

Mr. Abt: Defense rests, your Honor.

The Court: You move to dismiss?

Mr. Abt: I make a motion to dismiss.

The Court: Do you wish to argue it?

Mr. Abt: Just five minutes, maybe, your Honor.

The Court: All right. You may go ahead.

Renewal of Motion to Vacate Show Cause Order and Denial Thereof

Mr. Abt: I move now, your Honor, to vacate the show cause order, dismiss the proceeding and discharge the defendant, first upon the grounds that I urged in my motion at the opening of the proceeding, and second upon the further grounds that the evidence fails to sustain the charge [fol. 40] contained in the order to show cause and in the specifications.

* * * * * * *

[fol. 42]

* * * * * * *

The Court: Your motion is denied and you have exceptions.

I appreciate the frank and lawyer-like way in which you have argued it, too.

Judge's Statement and Finding of Guilt

In this case, the respondent, Gilbert Green, is ordered to show cause why he should not be held in criminal contempt of this court by reason of the fact that he knowingly and deliberately disobeyed and resisted a lawful order and command of this court, directing him to appear before it on July 2, 1951, July 3, 1951, and requiring him to surrender himself in execution of the judgment and sentence imposed under Indictment C. 128-87.

The specifications which have been served allege that the respondent wilfully, knowingly, disobeyed and resisted the order and command of this court, to wit, an order entered by the Honorable Sylvester J. Ryan, dated July 2, 1951, by failing to appear before the court, or failing to surrender to the United States Marshal on said date or at any date prior to his surrender at the United States Courthouse on February 27, 1956, on which date he did surrender.

The order of Judge Ryan, dated July 2, 1951, ordered [fol. 43] that the defendants in the case of United States of America against John B. Williams and others, including the respondent Gilbert Green, personally surrender to

the United States Marshal for the Southern District of New York in Room 318, United States Courthouse, Foley Square, New York, on the 2nd day of July, 1951 at 11:05 o'clock in the forenoon of that day.

The respondent did not surrender on that day nor did he surrender at any day thereafter until he finally apparently appeared on the courthouse steps on February 27, 1956, some four years or more after he had been ordered to appear.

The evidence introduced on this hearing shows that Mr. Sacher, the attorney for some of the defendants, advised Mr. Green that he was supposed to appear in the court on July 2, 1951. His own counsel in that case, as I understand it, Mr. Isserman, told him that he was to appear. Therefore it is very evident that he knew he was to appear, knew that he was ordered to appear, and that is borne out by the fact that in his press statement of February 23, 1956, Exhibit 9 on this hearing, he stated that "On February 27th at noon I shall cease being a fugitive," indicating that he knew that he was supposed to appear, not because of a bail bond, [fol. 44] but because of an order of this court.

And then he further said, "The course I chose five years ago was not dictated by personal considerations, that in many ways it was harder than that of imprisonment," indicating that he knew of the time that he was required to be here and that he was therefore a fugitive from an order of this court, and he knew that it was an order to appear which would require him to start serving his prison term.

The oral statements that the defendant made when he appeared on the courthouse steps to surrender on February 26 of this year, as shown in Government's Exhibit 8, indicated that he knew he had been wanted for five years. He stated that he jumped bail because he thought it was the best way he could do as an individual; that during these five years he did political work, and when asked where he was during those five years he made an answer which was obviously fanciful rather than truthful.

Under all the circumstances the Court can reach no other conclusion than that the respondent was ordered by an order of this court, signed by Judge Ryan, a duly authorized judge of this court, to surrender to the United States Mar-

shal on July 2, 1951; that he had knowledge of the order [fol. 45] that he was to surrender to the United States Marshal; that he deliberately disobeyed and resisted this lawful order and command of the court; that this deliberate and knowing disobedience to this order was a criminal contempt of this court, and that under the provisions of Section 401 of Title 18 of the United States Code, the court has power to punish by fine or imprisonment, at its discretion, a contempt of its authority such as disobedience or resistance to its lawful writ, process, order, rule, decree or command.

I find as a matter of fact that the respondent was guilty of disobedience to the lawful order of this court within the meaning of this section of the United States Code, and therefore he is guilty of the offense charged and subject to punishment by this court.

The points which have been very ably made by Mr. Green's counsel are points which have already been passed upon by the courts of this circuit and review was denied by the United States Supreme Court in the case of United States of America v. Gus Hall, whereas counsel for respondent says the facts were almost similar, except that in that case I don't believe the court had had the advantage of a motion picture of the respondent or a press release by the respondent.

[fol. 46] I find this respondent guilty as charged.

Are you ready for sentence?

* * * * * * *

[fol. 50]

* * * * * * *

I might point out that in 1951 there was at that time, when this defendant became a fugitive, there was no fugi-

[fol. 51] tive statute, so that the only way that the Court could punish for a contempt of its order was by this process, this inherent power in the Court. There is no limit of five years or any other limitation that I know of, and I think in this case your Honor should, in your discretion, impose a severe penalty for the deliberate contempt.

The Court: This defendant is under sentence of five years?

Mr. Williams: This defendant is under sentence of five years. There is one factor, he voluntarily surrendered himself. I say "voluntarily," although he surrendered himself at the same time when all the other Communists who were fugitives surrendered themselves, so it may not be voluntary on his part. But as far as the law is concerned, we did not catch him, he showed up.

The Court: How long was the period between the time that he was supposed to show up and the time when he did show up?

Mr. Williams: From July 2, 1951, to February 27, 1956, a period of about five years.

The Court: Five years. How much was the sentence for contempt in the Hall case?

[fol. 52] Mr. Williams: Three years in the Hall case and four years in the Thompson case.

The Court: Four years in the Thompson case. How long a sentence were they sentenced to after trial?

Mr. Williams: Five for Hall and three for Thompson.

Mr. Abt: Let me inquire, first, whether you have had an opportunity to read my memorandum.

The Court: I read your very able memorandum and also the memorandum submitted by Mr. Williams.

Mr. Abt: Let me then comment only very briefly, your Honor. The time, I take it, is limited. I intended to speak at greater length, but I shall not. I would like to submit, your Honor, that the question that is presented in my memorandum is both a novel one and a very serious one. It seems to me that it presents in a new aspect a part of a broader question which is, as your Honor knows, and has been the subject of frequent and very heated controversy, both on the national level and on the state level many times during our history: That is to say, the extent and scope of the power of the Court to punish for contempt.

On the one hand are the considerations of the preroga-[fol. 53] tives of the Court; on the other hand the problem presented by the fact that contempt is a summary process, the only situation known to the law, I think, your Honor, where the Court has the power to punish without an indictment or an information, without the presence of a jury.

And, as your Honor knows, because of those considerations Congress at the national level and the states at the state level have on a number of occasions severely if not drastically limited the ambit of the court's power to punish for contempt.

As your Honor has observed from my memorandum, only one case at the Federal level has ever passed upon the question that I present: that is to say, the proposition of contempt is a misdemeanor and may not be punished as a felony and hence the limit of the power of the court was to punish for one year.

That was the Creekmore case cited in the 8th Circuit back in 1916.

As I indicated in my memorandum, your Honor, I think it is plain that the case was inadequately argued and inadequately considered by the court. It was not pointed out to the court there that historically that at the time [fol. 54] of the enactment of the original judiciary act that contempts for time immemorial theretofore had been considered and punished only as a misdemeanor.

Nor was it pointed out to the court, nor did the court consider the effect of Section 402 of Title 18, which was then a part of the Clayton Act, to the effect that in a case of this character contempt should be punished in conformity with the usages of law and equity prevailing in October 1914.

As I point out in my memorandum, your Honor, the usages then prevailing in the Federal courts, or the usage then prevailing in the Federal courts, was that contempt was a misdemeanor. As of the date of the enactment of that statute no Federal Court, no case that I have found in the Federal Court, and apparently I am correct because the research of the Government has disclosed no case; no case prior to 1914, the date of the enactment of the Clayton Act that had imposed a sentence for criminal contempt in excess of a year.

And we submit that it was the intention of Congress in the enactment of what is now Section 402, to limit the power of the Federal Courts to punish criminal contempt [fol. 55] only as a misdemeanor, and had been approved both in the United States and in England theretofore.

In addition, your Honor, I think I did a thorough job on the state digests, and as I point out in my memorandum, there are only two cases, two reported cases, at least, throughout the entire history of the country, in which a state court has punished for contempt by a sentence in excess of a year.

In both of those cases, your Honor, the highest courts of the state reversed on the grounds that a contempt sentence in excess of a year, that is, a felony sentence, was beyond the power of the court.

In addition to that, your Honor, as you know, I went through all the state statutes to determine what the punishment for contempt was under state law, with the result which I summarized in the digest in my brief, that in 18 states the maximum penalty for criminal contempt was thirty days or less; in one state the maximum penalty is three months; in seven states six months; in only two states does the penalty reach to a year; in three states it [fol. 56] is made a misdemeanor; two states have general provisions; and twelve states have no provisions.

The Government says that this digest is very misleading. They say that it is misleading because of the fact that numerous contempts are also punishable under state law as crimes by longer sentences.

They point out, for example, that in New York where the maximum penalty that can be imposed for contempt is thirty days and a $250 fine; there is also a statute making bail-jumping a criminal offense and punishable by five years. That, of course, does not make the digest misleading, your Honor. The very point that I make in my brief is that the fact that the power of this court is limited in a contempt case to a misdemeanor sentence, of course, does not prevent the Government from imposing a larger sentence for what it regards as a serious offense, by making such a serious offense a crime.

What I do point out in my brief, your Honor, is that since the Legislature has that power and has exercised it as exemplified by the New York State Bail-Jumping [fol. 57] Statute, as exemplified now by the Federal Bail-Jumping Statute, that the effect for the proposition for which I argue is simply that if a sentence longer than a

year should be imposed for an act which is a contempt, it can be imposed only by making that act a crime and thus affording to the defendant his Constitutional right of indictment and a jury trial.

I suggest, your Honor, that in the whole study of the debate which from time to time has raged over the problem of contempt, that the issue that I am presenting to your Honor, that is, the question of whether a court in a contempt proceeding without indictment or information or jury trial, has limitless power to impose up to a life sentence on a defendant for any contempt of its authority, that the importance of that question transcends the fate or liberty of my client, important as the liberty of any individual is, your Honor, and presents a very serious question with reference to the administration of justice, which I submit, your Honor, should be decided in the light of the history of contempt and in the light of the Clayton Act and in the light of Section 402 and in the light of both [fol. 58] judicial and case history and legislation in the states and should be decided in favor of the proposition which I contend, that is to say, a misdemeanor, that a criminal contempt is punishable only as a misdemeanor.

The Court: You say it would not be an infamous crime?

Mr. Abt: Pardon me?

The Court: You say it would be considered as a misdemeanor and would not be an infamous crime?

Mr. Abt: It would not, your Honor, because under Title 18 misdemeanors are not punishable by penitentiary sentence, and the law is very clear, as the notes to rule 7 show, that a penitentiary sentence for a crime punishable by penitentiary sentence is an infamous crime.

I also point, as your Honor knows, in my memorandum that to hold that the court has the power to sentence a man for more than a year for criminal contempt and thus subject to him to infamous punishment raises a major constitutional question, that is to say, the question as to whether a criminal contempt is outside of the guarantee of the Fifth Amendment, that a crime involving infamous punishment must be prosecuted by indictment. And the [fol. 59] authorities are very clear, as your Honor I am sure knows, most recently in the Rumley case, that the

Court will wherever possible construe a statute or interpret a legal problem in such a manner as not to give rise to a Constitutional question of serious difficulty but to avoid that question.

And for that further reason, your Honor, in addition to everything that I have said, I would submit that it is proper, not only proper but necessary, to construe Section 401 as limiting the power of the court to punish in this type of case as in the case of a misdemeanor. Lawyers can disagree and judges can disagree with the lawyers.

The Court: Judges can disagree, too.

Mr. Abt: In the event your Honor is not persuaded, I want to add something further on the question of your discretion.

I saw Mr. Williams rise.

Mr. Williams: I wanted to advise——

The Court: Let's wait for that and let Mr. Williams answer the legal argument.

Mr. Abt: I have not concluded.

The Court: You have not concluded. I am going to hear you again.

[fol. 60] Mr. Abt: I want to conclude on the legal points by saying that I have tried to compress in an extremely brief compass what I said at greater length, and still I think not fully enough in the memorandum.

The Court: I read that with great interest. It was a very well-done brief, Mr. Abt.

Mr. Williams: Your Honor, I was simply going to remark that where the Supreme Court of the United States has so far imposed no such limitation on the power of the District Court, that this is not the type of case in which your Honor should so limit the power of the court, where from time immemorial the District Courts of the United States have had unlimited power to sentence for contempt of court, not merely for being a fugitive, but for contempt of court, if there should be any change at all it should be by a statute passed by the Congress of the United States and not by this court.

Mr. Abt: Well, my point is, of course, as your Honor knows, that a statute of the United States has been passed which does limit the power of this Court, that is to say, Section 402 of Title 18.

The Court: From time immemorial courts have had the [fol. 61] power to punish for contempt.

Mr. Abt: No question about that.

The Court: There has been no limitation in the statute that I can see that limits the extent of the punishment that can be given for contempt of court.

Now, you have raised the point which interested me very considerably, more than the discussion of the state court situation which I think is beside the case in the framework, you raised the question of whether Constitutionally if a defendant is to be sentenced for more than a year he is entitled to trial by jury, and that type of thing.

What was the situation in England at the time when the Constitution was adopted there?

Mr. Abt: The situation was, your Honor, twofold. First, that contempts were regarded as misdemeanors. And, second, if you will read Halsbury, which I cite, he says not only were they regarded as misdemeanors but that the power to proceed without indictment and a jury trial should be and was very sparingly exercised.

And indeed the situation in England was that you could proceed in contempt by an indictment and a jury trial.

[fol. 62] The Court: You could proceed, but they did proceed without them, didn't they?

Mr. Abt: They did proceed without them but imposed only sentences for misdemeanors,

The Court: When they sentenced them for a misdemeanor, was that a matter of jurisdiction or a matter of discretion?

Mr. Abt: I am afraid I do not understand you.

The Court: Was it a matter of discretion? They had the power. No English courts ever held that they could not be sentenced for more than a year for contempt, have they?

Mr. Abt: I do not know that any court has specifically so held. My research into the English law did not go that far; Halsbury and Fox say categorically that contempt is a misdemeanor. The basis for that in the English case law I am not able to enlighten your Honor on. I did not have an opportunity to go into it.

The Court: We have had a long history in this country where the Federal Courts have treated it not as a misdemeanor. There are a number of cases where they have imposed sentences greater than a year, in some cases as [fol. 63] much as three and four years.

Mr. Abt: Let me say this: There is only one Supreme Court case in which a sentence of more than a year was upheld.

The Court: That was in the Hill case. The Creekmore case that you referred to in the 8th Circuit was a year and a day.

Mr. Abt: A year and a day. There are about half a dozen or maybe eight cases, other than Hall and Thompson, in which Circuit Courts of Appeals have imposed or sustained sentences of more than a year, but in none of those cases with the single exception of the Creekmore case was the point that I am now arguing raised. And for the reason that I cite in my memorandum, I do not think the Creekmore case was well considered. So that you cannot say, your Honor, that a continuing practice of such proportions has occurred in the precedent that existed on that proposition.

In addition to which, as I point out in my memo, there was no case prior to the enactment of the Clayton Act, any reported case, in which a Federal Court had ever imposed a contempt sentence of more than a year.

[fol. 64] I would like to add just one thing.

The Court: Certainly.

Mr. Abt: Perhaps I misunderstood Mr. Williams. I understood him to say that if it were to be held that contempt is a misdemeanor and the power of the court so limited should not be held in a case of this character. If Mr. Williams by that remark was referring to the factual character of this case or, to be very plain about it, that my client is a Communist——

The Court: I gathered what Mr. Williams meant— I do not know, but I gathered, the impression made upon me was that if such a new doctrine was to be established, it should not be established by a District Court.

Mr. Williams: Not only that, your Honor, but I do mean in a case of this character where there was such a

flagrant and deliberate contempt of the Court, where a man has been out for five years; I do not care whether it is a Communist case or any other kind of a case.

Mr. Abt: I would like to reply to that, if a reply is necessary, and perhaps it isn't.

The Court: I will be glad to hear you.

[fol. 65] Mr. Abt: I would only like to say that if the law is as I contend, that is to say, that the power of this Court or of any Federal Court is limited to imposing a sentence not in excess of a year, then this court has no power in any case, be the defendant a Communist, and irrespective of the nature of the contempt, the law, I trust, is still the law.

The Court: If the law is as you state it, then the Court would not have power.

Mr. Abt: Would not have power, your Honor. And if the law of our land means anything, it means that the law is applicable to all individuals irrespective of their race or political convictions, religion or anything else, and irrespective of the character of the offense which they are alleged to have committed.

The Court: That is entirely correct, Mr. Abt.

It will be my conclusion, after giving careful consideration to the arguments that you have made and your authorities, that the Court is not limited to a sentence of a year or less in this type of case.

The United States Supreme Court has approved sentences greater than that. It has denied certiorari in cases [fol. 66] where sentences have been greater than a year. I feel that I am bound by that fact.

Mr. Abt, you have raised a very interesting point which you say was not properly presented in those cases, and of course you will have the right to present it in this case and I trust that you will. But I feel that in this case I must follow the decisions in previous cases and that I am not limited to consider this as a case that can be sentenced for less than a year.

With that understanding, are you ready for sentence?

Mr. Abt: No, not quite. I must bow to your Honor's ruling, to pursue the point elsewhere. But I do now want

to address myself to the question of your Honor's discretion.

I think, your Honor, that it must be conceded, quite apart from the question of power, that the sentences in the Hall case and in the Thompson case were of unprecedented severity, three years and four years. And all the books, including the cases that the Government cites in its memorandum today, in all of those cases, the very maximum sentence that has ever been imposed in this [fol. 67] country for criminal contempt was two years. There are only two such cases, your Honor, the Hill case and the case, the name of which I have forgotten in the 8th Circuit. So that I think we must start from that premise, your Honor, that those two sentences, as I have said, were of an unprecedented severity.

I would like to suggest, your Honor, in explanation of that that those sentences were imposed at a time of the most intense public excitement and apprehension over the question of Communism in this country. They were imposed at a time, your Honor, when I think all thinking people were extremely fearful that we might be indeed on the eve of a war between the two systems, capitalism and Communism. And I submit, your Honor, with all respect to the judiciary, that no man, be he a layman, a lawyer or a judge, can but be affected by an atmosphere of that character.

Fortunately for all of us, your Honor, today we have moved into calmer times, certainly on the international front where our own Government leaders say and tell us that tensions have relaxed, and that there is a real possi- [fol. 68] bility for a durable peace, and also domestically, your Honor, where, in my judgment, we have a chance to return to the fundamental principles of the Constitution, which were departed from in many aspects during that difficult period.

I suggest, your Honor, that that is an important factor which should and must be taken into account, as was given the unprecedented nature of the sentences in the Hall and Thompson cases.

Second, your Honor, as Mr. Williams has pointed out at the trial and again today, and as your Honor indicated at

the trial there was a matter to be considered on the question of sentence.

There is a distinction between this case and the Hall and Thompson cases. In those cases the defendants were apprehended. Here Mr. Green surrendered voluntarily. Restitution, your Honor, has always been a matter to be considered in a defendant's favor on the question of sentence. Mr. Green made restitution in the only form in which restitution can be made in a case of this character. He made restitution of himself by coming in here voluntarily and submitting to the jurisdiction of the Court.

[fol. 69] In addition to that, your Honor, as I understand a proceeding of this character, the primary purpose is to vindicate the authority of the Court. If that be its purpose, your Honor, then certainly consideration should and must be given to the fact that Mr. Green has voluntarily submitted himself now to the authority of the Court.

Further than that, your Honor, as Mr. Green said in the statement which Mr. Williams put into evidence at the time of the trial, and as I am sure is true, the punishment which he imposed on himself over these past five years is probably of a severity which cannot be matched by any sentence that any court can now impose on this defendant.

I submit, your Honor, that these are all matters which go to your discretion and should be considered in imposing sentence.

I would like to say only, finally, your Honor, that consideration of those matters and a sentence in conformity with those considerations, it seems to me today would be greeted both in this country and indeed all over the world as an evidence not of weakness but of the strength of the democratic principles which have guided and I trust will [fol. 70] continue to guide both the judiciary and the legislature and all other Governmental bodies in this country.

Mr. Williams: May I comment briefly on the question of sentence? In the Miranda case a 3-year sentence for contempt was given him by Judge Walsh in October 1954 when he refused to answer questions on cross-examination after taking the stand as a defendant. That was the Puerto Rican seditions conspiracy case.

Mr. Abt: Is that pending on appeal, Mr. Williams?

Mr. Williams: I do not know if it is still pending on appeal or not. Certiorari was denied.

Mr. Abt: The petition was. How about the contempt sentence?

Mr. Williams: I understand it was all together. In the Yates and Philips case which is cited in our memorandum the defendants got three years for contempt.

I would like to point out that with reference to Mr. Hall, who has previously been sentenced in this court, he was a fugitive for only two months and got three years for contempt.

Thompson was a fugitive for only 25 months and got 4 [fol. 71] years for contempt. Mr. Green has been a fugitive for 4½ years.

On the subject of calmer times as to this particular defendant, I do feel, your Honor, that while the times may be calmer, they are no less perilous, and this man in a very real sense, he has been convicted of a conspiracy to overthrow the Government of the United States by force and violence. He is in effect a spy, a hostile force in our midst. He is entitled to no consideration from this court. He has openly defied its order and its mandate and he came in only when he was ordered to do so by his bosses, along with the other Communist fugitives. I have absolutely no sympathy for him and I do think your Honor should impose a severe sentence, bearing in mind only the fact that he did surrender himself voluntarily.

That is the only mitigating circumstance in the whole case, and that is somewhat dulled and tarnished by the fact that he came in on orders from the Communist Party.

Mr. Abt: Your Honor, may I say just a couple of things and very briefly?

First, Mr. Williams cited the Yates case as an example [fol. 72] of a 3-year contempt sentence. As Mr. Williams knows and as his brief says, that case was reversed on appeal.

Mr. Williams: On other grounds.

Mr. Abt: On other grounds, but there is no 3-year contempt sentence in Yates case.

As I informed your Honor the other day and as I state in my brief, the contempt sentence in the Philips case is

now pending on appeal in the 9th Circuit, and the question which I earlier argued to your Honor, is pending there.

Next, your Honor, Mr. Williams again misstated, he made the same mis-statement at the time of the trial and I did not point it out then, again mis-stated the nature of the charge of the indictment in the principal case in which Mr. Green was convicted. He was not charged or convicted of conspiring to overthrow the Government, your Honor. The Smith Act statute under which he was charged and convicted was a charge of conspiring to teach and advocate the violent overthrow of the Government.

Mr. Williams has characterized, this morning, has characterized Mr. Green as a spy. Your Honor, there is no evidence to that effect in the main case. Of course, Mr. [fol. 73] Williams did not put a word of such evidence into this case. He again charged him with being a conspirator, being motivated by something, I do not know just what.

Again, your Honor, that is completely extraneous to the charge here. Mr. Williams made the same charge at the time of the trial. As your Honor knows, there was not a word of proof put into support it. And obviously those considerations, your Honor, are completely they are not considerations; they are inventions of Mr. Williams and certainly are not competent to be considered by your Honor on the question of sentence.

The Court: Have you anything to say as to why sentence should not be imposed upon you?

The Defendant: I do, your Honor. With your permission, I would like to address myself to the question of intent.

The Court: What? Intent?

The Defendant: Intent. I would like to explain the motives for my action.

It seems to me that without understanding these, nothing else is comprehensible.

. . . . . .

[fol. 74]

. . . . . .

The Court: All I am interested in is the contempt charge against you. You can talk about your motives as to the failure to surrender, if you want. We are not going to retry the original case.

The Defendant: If you bear with me, please, your Honor, for a few minutes, I think I shall indicate the relationship that one has to the other.

Furthermore, as your Honor undoubtedly knows, it is [fol. 75] no accident that in all of Anglo-Saxon jurisprudence there are only four instances in which men have been brought to court on a charge of criminal contempt for failure to surrender and in each instance the case was of one of the defendants in an original Smith Act trial. Thus there is a political undertone.

The Court: Does that mean anything? Does that mean that ordinarily a person who takes advantage of the legal systems of our Government and gets the benefit of a trial by jury and appeals, when he is convicted, he surrenders? Or does it mean that only in the case of these particular defendants that they believe that they had the right to flout the law? Is that the reason why the thing has never come up before?

The Defendant: No, sir. I would ask your Honor——

The Court: What are the motives? I would like to know what your motives were in flouting the order of the Court.

The Defendant: Do I have your permission——

The Court: Yes, provided you talk on something that is relevant, the thing you want to talk about. Go ahead. [fol. 76] The Defendant: My actions in not surrendering, my motives behind those actions, were not motivated, your Honor, by any desire to escape a cruel and unjust punishment or crime I never committed. For I have not conspired against the Government of the United States. I have not advocated force or violence. I committed no crime. I broke no law. I knew that some day I would appear here voluntarily and I hoped, fervently hoped, your Honor, that that day would soon arrive. For to me it would mean the possibility of seeing my wife and children again, even though it were through the cold steel of prison walls.

But, your Honor, it has been said that each man must act in accord with his spirit, that each man must act in accord with his conscience. To me the unjust conviction did not arise from nowhere. It did not occur in some vacuum. To me it was part of a pattern, a pattern that bode no good for America.

In 1951 this nation was engaged in a highly unpopular war in Korea. Powerful voices then were demanding an extension of that conflict across the Yalu River in China, and by the use of the atomic bomb. At home we were witnessing a trend toward political repression, which be- [fol. 77] came labeled as McCarthyism. Men in all walks of life were fearful as to what was happening to Constitutional liberties in the country.

It seemed to me at that time, your Honor, that it was necessary to act in such a way as to help alert public opinion of the nation to the perils before it; to the fact that the nation was gradually destroying the basic democratic principles from which it was founded.

There was another purpose that I had. I wanted to do what I as an individual could to help clear my own good name and the good names of my co-defendants from the false accusations brought against us. And I hope that in some small way the book which I wrote during this past period will help clear up some of the mass of confusion that exists in the mind of the public as to what the Communists aspired to and what they proposed for their country.

I am, your Honor, of course fully aware that men can honestly disagree with my estimate of the situation in 1951, or my estimate of the situation in general.

I am also fully cognizant, your Honor, that men may [fol. 78] question and honestly question the wisdom of my action, whether it served the purpose for which it was meant. But, your Honor, irrespective of whether men agree or disagree with me and my political beliefs or in my actions, yet it seems to me that what I did did not have as intent either contempt for this Court or criminality.

On the contrary, as I see it, it seems to me that the motivation was sincerely that of a patriotic effort to do what I thought was best for the people of this country.

The Court: You thought then that you could set yourself up to judge that and that your judgment was the judgment that would govern? That is hardly the democratic way of proceeding, that you were going to set yourself up as a dictator of the country. I do not think you meant that, do you?

The Defendant: No.

The Court: The democratic process, of course, is that a man is entitled to a trial, to present all his facts, entitled to an appeal, entitled to all of the benefits of the law, entitled to the voice of very able counsel such as Mr. Abt is here. But it also implies an equal responsibility of complying [fol. 79] with the law and not setting a person up as being an arbitrator dictator of what is the law. As soon as you do that, you have no more democracy in the world.

Now, I do not quite understand when you say that your motive was to protect the United States. Were you going to decide for yourself what was best for the United States? Who was deciding what was best for the United States? You?

The Defendant: No, your Honor.

The Court: Then why wasn't that just a contempt of this Court? After a long trial and after appeals all the way to the United States Supreme Court they decide that you are guilty and that you should surrender? The democractic processes were at work and you set yourself up and said, "I do not care what the democratic processes are, I am going to decide, and I won't surrender."

Isn't that what you are saying was your motive?

The Defendant: No, it is not.

. . . . . .

[fol. 87]

. . . . . .

SENTENCE

It is the sentence of the Court that you be sentenced to three years in jail, to follow the completion of your present jail sentence.

. . . . . .

[fol. 1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 149-294

UNITED STATES OF AMERICA,

v.

HENRY WINSTON, Defendant.

Excerpts from Stenographer's Minutes in Winston Case

Before:

HON. ARCHIE O. DAWSON, District Judge.

New York, March 26, 1956
2.15 o'clock p.m.

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, and Thomas A. Bolan, Esq., Assistant United States Attorney, for the Government.

Harry Sacher, Esq., and Edward J. Cambridge, Esq., Attorneys for Defendant.

[fol. 21]

. . . . . .

Mr. Williams: This is entitled:

NEWSPAPER RELEASE BY HENRY WINSTON

"For Immediate Release to All Newspapers.
"Announcement by Henry Winston,
"National Leader of the Communist Party.
"International News Service.
"New York"——

That is the addressee, not the address.

The Court: Is the thing dated?

Mr. Williams: It is dated at the end March 1, 1956, and it is addressed to the International News Service, New York.

"In 1948 a hastily called, hand-picked blue ribbon grand jury issued an indictment falsely charging me with having conspired to advocate the overthrow of the government by force and violence. Later a trial was held in an atmosphere charged with hysteria. I was convicted and sentenced to a five-year prison term and fined $10,000. I became an early [fol. 22] victim of the cold war.

"My conviction was a travesty of justice. It was inevitable, of course, that sooner or later the real jury of my peers—the American People—would understand that I had been convicted for my opposition to the Korean War and my efforts in defense of labor, negro and democratic rights."

May I interrupt very briefly, your Honor?

The Court: Well, just read it so that I will get the sequence of the whole thing.

Mr. Williams: (Reading)

"But whether this understanding would come before McCarthyism succeeded in completely dominating American life, or before the war-minded monopolists succeeded in plunging the nation into even graver international adventures and a new world war, was not yet determined.

"I was compelled to ask myself, as did all Americans opposed to the stampede toward world war and McCarthyism: How could I best serve the interests of the nation and help arouse its people to fight more determinedly for the Bill of Rights against those who were spreading the false gospel of inevitable war? I chose the path I did [fol. 23] as my method of struggle against a growing fascist menace. The hardships and privations that this entailed, the separation from my wife, children and friends were, understandably, difficult. But personal welfare and happiness could have meaning for me and my family only in a democratic America at peace with the world.

"What I did had precedent in American tradition. Before the Civil War under the tyranny of slavery, many negroes were compelled to become refugees. This was the fate of the great American Frederick Douglass, who so valiantly served the cause of negro emancipation and American democracy.

"In the pages of American history, the names of those responsible for the infamous Dred Scott decision of the Supreme Court have long been forgotten. But deeply enshrined in the hearts and minds of America, and in the lore of American tradition, are to be found the names of negro and white abolitionists who continued in the fight for justice regardless of temporary reactionary victories. And even today, in the face of Dixiecrat terror against the negro people, outstanding men such as the Rev. J. A. DeLine from South Carolina, have been forced to seek refuge in [fol. 24] the North.

"The charge of conspiracy against me was as false as the conspiracy charges against negro leaders in Montgomery, Alabama. In my case, it was part of reactionist efforts to McCarthyize America. And the latter ca the Dixiecrats are using it specifically to bolster the system of racism and oppression. They hope to frustrate the efforts of the negro people to attain the equality guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments. The McCarthys and Eastlands are a continuing danger to equality and freedom. They are the real conspirators against the Constitution of the United States.

"Nonetheless, since 1951 important changes have taken place. Our country and the world today are at peace. McCarthyism has been set back on its heels.

"The dark smog of hysteria and fear is clearing as fresh winds of hope circle the globe. The future for our people looks brighter.

"Reiterating my innocence, and protesting the flagrant miscarriage of justice in my case, I now enter prison with confidence that the American people will defeat the Mc-[fol. 25] Carthys and Eastlands. I am convinced they will restore the Bill of Rights to its proper place and will put an end to the Smith-McCarran and other anti-democratic laws. They will also, I am sure, now prevent the conviction as conspirators of the heroic negro men and women in Montgomery, Alabama. It will not be long before they will understand the harm of anti-communism and demand a reversal of my conviction and my complete exoneration and freedom.

"I shall appear this coming Monday, March 5th, 12:30 p.m., at the U. S. Marshal's Office in Foley Square."

Signed "Jenry Winston" and then typewritten "Henry Winston, March 1, 1956."

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[fol. 36]

• • • • • • •

EXCERPTS FROM JUDGE'S STATEMENT AND FINDING OF GUILT

There is no doubt that the defendant knew of his conviction, knew of the sentence, knew that the United States Supreme Court had affirmed the conviction and knew that [fol. 37] he was supposed to be in court and advised to be in court.

Now at that particular time the evidence introduced here or stipulated here shows that the defendant disappeared. His own attorney said he didn't know where he was.

The janitor of the house where he lived, who had seen him regularly up to that time, said he disappeared, did not know where he was; that the United States marshal searched for him and could not find him; that he did not appear in court as he had been ordered to do.

Now the only issue made by the respondent here in this hearing is that he did not know of a particular order of July 2, 1951, issued by the Hon. Sylvester J. Ryan, and on the evidence introduced on this hearing I think it has been conclusively established that the respondent did know that an order had been issued for him to appear and surrender. He knew certainly from the conversation with his counsel on the previous Friday that such an order was being prepared; he knew that he was expected to surrender himself. He voluntarily left his regular place of residence and remained in hiding for a period of almost five years; [fol. 38] it would strain credulity to say that he did that and at the same time was ignorant of the fact that an order had been entered for him to appear for surrender.

The statement issued by the respondent on March 1, 1956, which he sent to the press, announcing that he would surrender on March 5, 1956 is clear evidence that he knew that he had been ordered to appear theretofore.

In that statement he analyzed his own thinking in connection with the matter and made it clear that what he did in failing to surrender was an intentional act done by him with knowledge that it was a violation of the order of the Court.

This appears very clearly from the fourth paragraph of this statement in which he says that he chose the path he did as a method of struggle against a growing fascist menace, and that the hardships and privations that this entailed were difficult, showing that he intentionally failed to surrender, knowing that he was expected to surrender because of an order of this Court.

Under those circumstances, the Court finds as a fact that the Hon. Sylvester J. Ryan, a judge of this Court, issued [fol. 39] an order dated July 2, 1951, directing the respondent to surrender to the United States Marshal, that the respondent previously had been convicted, sentenced to a five-year prison term and fined $10,000, and his conviction had been sustained.

The Court finds as a fact that the respondent, with knowledge of the order of the Judge Ryan, absented himself, remained in hiding, and failed to comply with the order of the Court by failing to surrender to the United States Marshal; that these acts were done by the respondent deliberately, intentionally, with knowledge of the order of the Court, and that such acts were a contempt of court in that it was disobedience to a lawful order of this Court requiring the respondent to surrender to start serving his jail term.

I find the respondent guilty of the charge and specifications of the criminal contempt.

. . . . . .

[fol. 65] GOVERNMENT'S EXHIBIT NO. 1

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C128/87

UNITED STATES OF AMERICA

v.

GILBERT GREEN

JUDGMENT AND COMMITMENT

On this 21st day of October, 1949, came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully & knowingly conspiring to organize as the Communist Party of the U.S. of America a society, group and assembly of persons who teach & advocate the overthrow and destruction of the Government of the U.S. by force and violence, & knowingly & wilfully to advocate and teach the duty and necessity of so overthrowing and destroying the Government of the United States T. 18 Sec 11 & 13 USC as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS and fined $10,000. Defendant to stand committed until fine is paid or he is otherwise discharged by due course of law

~~It Is Adjudged that~~

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Harold Medina,
United States District Judge

~~The Court recommends commitment to~~:[6]

(Signed) ..... (By) .....
Clerk. Deputy Clerk.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendre," as the case may be.

[3] Insert "in count(s) number . . " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 66] *3/9/50 Recd from Deft Green $10,000—slc time in escrow*

July 6th, 1951. Fine in full Paid $10,000. PAID (FROM REGISTRY).

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§ Italicized material is handwritten notation.

[fol. 67] GOVERNMENT'S EXHIBIT NO. 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

v.

EUGENE DENNIS, JOHN B. WILLIAMSON, JACOB STACHEL, ROBERT G. THOMPSON, BENJAMIN J. DAVIS, JR., HENRY WINSTON, JOHN GATES, IRVING POTASH, GILBERT GREEN, CARL WINTER, and GUS HALL, Appellants.

Before: L. Hand, Swan and Frank.
Circuit Judges.

The prosecution having upon argument conceded that the appeal herein raises a "substantial question", (Rule 46 (a) (2) of the Rules of Criminal Procedure) it is

Ordered, Adjudged and Decreed that pending his appeal to this Court each of the above mentioned defendants will be released upon his posting a bond in the sum set opposite his name.

Eugene Dennis	$30,000.
John B. Williamson	$30,000.
Jacob Stachel	$30,000.
Robert G. Thompson	$20,000.
Benjamin J. Davis, Jr.	$20,000.
Henry Winston	$20,000.
John Gates	$20,000.
Irving Potash	$30,000.
Gilbert Green	$20,000.
Carl Winter	$20,000.
Gus Hall	$20,000.

L. HAND
THOMAS W. SWAN
JEROME N. FRANK,
C.J.J.

November 2, 1949

[fol. 68] GOVERNMENT'S EXHIBIT No. 3

State of New York,
County of New York, ss.:

Frederick V. Field, Robert W. Dunn, and Dr. W. Alphaeus Hunton, each being duly sworn deposes and says that each of them is a trustee named in and acting in accordance with the annexed Agreement and Deed of Trust; and that the 3 affiants herein constitute a majority of the 5 trustees named in said Agreement and Deed of Trust.

That under said Agreement and Deed of Trust the trustees purchase Bearer Bonds of the Government of the United States with monies given to them by diverse persons, and said trustees upon receipt of any and all monies issue to such persons receipts of which a true and correct copy is hereto annexed.

That the bonds this day delivered by Robert W. Dunn as collateral security for bail in the case of U. S. v. Foster et al, C-128-87 *involving Eugene Dennis, Benjamin J. Davis, Jr., John Gates, Irving Potash, Carl Winter, Jacob Stachel, Gilbert Green, Robert Thompson, John Williamson, Henry Winston and Gus Hall* are exclusively bonds purchased by the trustees with monies obtained and receipted for by them in the manner aforesaid.

That in addition to the general authroity contained in the annexed Agreement and Deed of Trust, all the trustees duly adopted a resolution at a meeting of the trustees held on July 22, 1948, reading as follows: Resolved that the trustees hereby authorize the use of the bail fund for such bail as might be required in the case of the Communist leaders indicted under the Smith Act on July 20, 1948, at all stages of the proceedings and until the case is finally terminated.

/s/ Frederick V. Field
/s/ Robert W. Dunn
/s/ W. Alphaeus Hunton

Sworn to before me
this third day of
November, 1949.

Daniel Tanenbaum

Daniel Tanenbaum
Notary Public, State of New York
No. (illegible)
Qualified in Kings County No. 227
Certs. filed (illegible)
Term Expires (illegible)

[Italicized material is handwritten addition, initialled by FVF, RWD, and WAH.]

[fol. 69] AGREEMENT AND DEED OF TRUST

WHEREAS, the Civil Rights Congress of New York, an organization devoted to the protection of the rights of labor and of all civil rights, anticipates that in the course of the struggle of organized labor for the maintenance of living standards, and in the course of defense of civil rights in general by the Civil Rights Congress, there will be need of a Bail Fund for the benefit of strikes, and of those whose civil rights are threatened of under attack, and

Whereas, this Bail Fund, to be called the Bail Fund of the Civil Rights Congress of New York, is to consist, in part of loans and donations in cash and securities to be contributed to the General Bail Fund and Administrative Fund, in part of loans and donations of cash and securities allocated by the lenders for use in connection with specific strikes, or for the bail of specified persons, which loans and securities are intended to be thoroughly secured and safeguarded and to be employed solely and strictly for the purposes contributed or deposited, and

WHEREAS, to that end a Board of Trustees has been created, to consist of Robert W. Dunn, Frederick V. Field, Abner Green, Dashiell Hammett and W. Alphaeus Hunton, to which may be added such other person or persons as shall be deemed adviseable by the already named trustees, which Board of Trustees shall have sole and exclusive control over the Bail Fund, its administration and use, and

Whereas, the said Board of Trustees has elected from among its members, Robert W. Dunn to act as Treasurer to receive all loans and donations for deposit and investment in the name of the Board of Trustees.

THEREFORE, the Board, to insure the safety and security of the assets of the Bail Fund to its lenders and contributors, enters into this deed of trust with the treasurer:

1. The Treasurer agrees to receive all monies and securities loaned and contributed to the Bail Fund of the Civil Rights Congress of New York on behalf of the Board of Trustees of the said Fund, and promptly upon receipt thereof, to deposit same in a depository selected by the Board of Trustees and in its name,

2. The Treasurer agrees to issue to all persons lending funds to the said Bail Fund a certificate of deposit in such form as shall be approved by the Board of Trustees, which certificate of deposit shall set forth the terms and conditions upon which said monies are received and shall issue to all persons contributing funds to said Bail Fund, a receipt acknowledging said contributions, which receipt shall likewise be in a form to be approved by the said Board of Trustees.

3. The Board of Trustees thereon agrees to accept said sums and securities and thereupon to employ all monies and securities in its possession for the purposes contributed, and generally to utilize the assets of the funds to carry out the objects and intentions of the Bail Fund of the Civil Rights Congress of New York as provided for by, and under the resolutions of the Board of Trustees and the regulations adopted by it, governing the administration of the Fund, which regulations shall be consistent with the general purposes of the fund as set forth herein.

4. The Board of Trustees agrees to make provision to have bail posted in such a manner and pursuant to such regulations as it may deem fit to adopt, consistent with the general purposes of the Fund.

5. The Board of Trustees also agrees to repay all loans to the general Bail Fund upon thirty days notice in writing and to repay all loans allocated to a specific strike as soon

as possible after the termination of such strike, and to repay all loans made for bail for a specific named individual as soon as that bail is released by the courts, provided, however, that repayment of such loans shall not be made in such a manner as to imperil the safety of any individual for whom bail has been posted.

[fol. 70] 6. The Board of Trustees shall not be obligated to pay interest on any loans so received, but also agrees that there shall not be deducted from any sums so received as loans any monies on account of administrative disbursements in connection with the operation of the Fund.

7. Upon the liquidation of the Fund and return of all monies loaned to the lenders thereof, or sooner if in the opinion of the Trustees the repayment of any such loans shall not be imperilled, the Board of Trustees agrees to deliver all surplus funds received by the Board of Trustees as contributions, and not as loans, to the Civil Rights Congress of New york, to be used by the Civil Rights Congress of New York for its general purrposes.

8. This deed of Trust and Agreement may be signed by the Trustees on the original or any duplicate thereof with the same force and effect as if all signatures appeared on the same copy.

In witness whereof, this Deed of Trust, originally dated September 16, 1946, and as amended September 26, 1949, has been signed by the Treasurer and the Trustees of the Bail Fund of the Civil Rights Congress of New York, this 26th day of September, 1949.

.....
Treasurer

.....
Trustee

.....
Trustee

.....
Trustee

.....
Trustee

/s/ Abner Green
Trustee

NO. 354

(P. 5-1)

CASH CERTIFICATE NUMBER C 5375

DATE

RECEIVED FROM

ADDRESS

CITY STATE

RECEIVED BY

BAIL FUND of the CIVIL RIGHTS CONGRESS of NEW YORK

205 EAST 42 STREET, ROOM 1613, NEW YORK 17, N. Y.

CASH CERTIFICATE NUMBER C 5375

Certificate of Deposit

Receipt is hereby acknowledged this day of , 194 , of the sum of

received from

of

by the Board of Trustees of the Bail Fund of the Civil Rights Congress of New York, for the uses and purposes of said Bail Fund upon the following terms and conditions:

1 *Said moneys shall be employed only for the purpose of posting bail for defendants in cases involving violation of civil rights, and the Trustees of the Bail Fund shall have sole authority, under the regulations and resolutions adopted by the Board of Trustees, to determine for whom bail shall be posted.*

2 *Said moneys shall be repaid to the lender without interest upon 30 days notice in writing, providing, however, that repayment of loans shall not be made in such a manner as to imperil the safety of any individual for whom such moneys may have been posted as bail, and the Trustees shall have sole authority to determine whether such peril exists; and provided further that the 30 days of notice may be waived by the Trustees to permit immediate return of any loan.*

3 *That the depositor shall at the time that he applies for the return of the moneys loaned by him to the said Board of Trustees, accompany his application with this Certificate of Deposit and that no money shall be returned except upon surrender of this Certificate of Deposit.*

DATED: NEW YORK, N. Y., , 19

Treasurer

TRUSTEES: Dashiell Hammett, Chairman Abner Green
Frederick V. Field, Secretary Dr. W. Alphaeus Hunton
Robert W. Dunn, Treasurer Milton Wolff, Counsel

Assistant Treasurer

Not good unless signed by Treasurer and countersigned by Assistant Treasurer.

[fol. 72] AGREEMENT AND DEED OF TRUST

WHEREAS, the Civil Rights Congress of New York, an organization devoted to the protection of the rights of labor and of all civil rights, anticipates that in the course of the struggle of organized labor for the maintenance of living standards, and in the course of defense of civil rights in general by the Civil Rights Congress, there will be need of a Bail Fund for the benefit of strikes, and of those whose civil rights are threatened or under attack, and

Whereas, this Bail Fund, to be called the Bail Fund of the Civil Rights Congress of New York, is to consist, in part of loans and donations in cash and securities to be contributed to the General Bail Fund and Administrative Fund, in part of loans and donations of cash and securities allocated by the lenders for use in connection with specific strikes, or for the bail of specified persons, which loans and securities are intended to be thoroughly secured and safeguarded and to be employed solely and strictly for the purposes contributed or deposited, and

WHEREAS, to that end a Board of Trustees has been created, to consist of Robert W. Dunn, Frederick V. Field, Abner Green, Dashiell Hammett and W. Alphaeus Hunton, to which may be added such other person or persons as shall be deemed adviseable by the already named trustees, which Board of Trustees shall have sole and exclusive control over the Bail Fund, its administration and use, and

Whereas, the said Board of Trustees has elected from among its members, Robert W. Dunn to act as Treasurer to receive all loans and donations for deposit and investment in the name of the Board of Trustees.

THEREFORE, the Board, to insure the safety and security of the assets of the Bail Fund to its lenders and contributors, enters into this deed of trust with the treasurer:

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Rights Congress of New York on behalf of the Board of Trustees of the said Fund, and promptly upon receipt thereof, to deposit same in a depository selected by the Board of Trustees and in its name.

2. The Treasurer agrees to issue to all persons lending funds to the said Bail Fund a certificate of deposit in such form as shall be approved by the Board of Trustees, which certificate of deposit shall set forth the terms and conditions upon which said monies are received and shall issue to all persons contributing funds to said Bail Fund, a receipt acknowledging said contributions, which receipt shall likewise be in a form to be approved by the said Board of Trustees.

3. The Board of Trustees thereon agrees to accept said sums and securities and thereupon to employ all monies and securities in its possession for the purposes contributed, and generally to utilize the assets of the funds to carry out the objects and intentions of the Bail Fund of the Civil Rights Congress of New York as provided for by and under the resolutions of the Board of Trustees and the regulations adopted by it, governing the administration of the Fund, which regulations shall be consistent with the general purposes of the fund as set forth herein.

4. The Board of Trustees agrees to make provision to have bail posted in such a manner and pursuant to such regulations as it may deem fit to adopt, consistent with the general purposes of the Fund.

5. The Board of Trustees also agrees to repay all loans to the general Bail Fund upon thirty days notice in writing and to repay all loans allocated to a specific strike as soon as possible after the termination of such strike, and to repay all loans made for bail for a specific named individual as soon as that bail is released by the courts, provided, however, that repayment of such loans shall not be made in such a manner as to imperil the safety of any individual for whom bail has been posted.

[fol. 73] 6. The Board of Trustees shall not be obligated to pay interest on any loans so received, but also agrees that there shall not be deducted from any sums so received

as loans any monies on account of administrative disbursements in connection with the operation of the Fund.

7. Upon the liquidation of the Fund and return of all monies loaned to the lenders thereof, or sooner if in the opinion of the Trustees the repayment of any such loans shall not be imperilled, the Board of Trustees agrees to deliver all surplus funds received by the Board of Trustees as contributions, and not as loans, to the Civil Rights Congress of New York, to be used by the Civil Rights Congress of New York for its general purposes.

8.
This deed of Trust and Agreement may be signed by the Trustees on the original or any duplicate thereof with the same force and effect as if all signatures appeared on the same copy.

IN WITNESS WHEREOF, this Deed of Trust, originally dated September 16, 1946, and as amended September 26, 1949, has been signed by the Treasurer and the Trustees of the Bail Fund of the Civil Rights Congress of New York, this 26th day of September, 1949.

/s/ Robert W. Dunn
Treasurer

/s/ W. A. Hunton
Trustee

/s/ Frederick V. Field
Trustee

/s/ Dashiell Hammett
Trustee

/s/ Robert W. Dunn
Trustee

_____

Trustee

[fol. 74] United States of America,
Southern District of New York, ss.:

BE IT REMEMBERED, that on this 3rd day of November in the year of our Lord one thousand nine hundred and forty nine before me ~~George J. M. Follmer~~, Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit, personally came GILBERT GREEN of No. 806 S. Independence Blvd., Chicago, Illinois—4578 42nd St Queens principal, and Robert W. Dunn of No. 80 East 11th St., New York City surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said GILBERT GREEN the sum of Twenty Thousand ($20,000) Dollars, and the said Robert W. Dunn the sum of Twenty Thousand ($20,000) dollars, separately to be levied and made of their respective goods and chattels, lands and tenements, to the use of the said United States, if default shall be made in the conditions following, to wit:

WHEREAS, lately, on the 21st day of October, 1949 in the District Court of the United States for the Southern District of New York, in a cause pending in said District Court between the United States of America and GILBERT GREEN, defendant, a judgment and sentence was rendered against the said GILBERT GREEN and the said GILBERT GREEN filed an appeal in the United States ~~Circuit~~ Court of Appeals for the Second Circuit to reverse the judgment and sentence imposed against him, and

WHEREAS bail was fixed in the sum of Twenty Thousand ($20,000) Dollars pending the disposition of said appeal.

Now, the conditions of this recognizance are such, that if the said GILBERT GREEN shall appear either in person or by attorney in the United States ~~Circuit~~ Court of Appeals for the Second Circuit when said cause is reached for argument or when required by law or rule of said United States ~~Circuit~~ Court of Appeals and from day to day thereafter in said United States ~~Circuit~~ Court of Appeals until said cause is finally disposed of, and shall abide by and obey all orders made in said cause and shall surrender himself in execution of the judgment and sentence appealed from upon such day as the District Court of the United

States for the Southern District of New York may direct, if the judgment and sentence appealed from shall be affirmed, and shall appear before the District Court of the United States for the Southern District of New York on such day or days as ahll be sent for a retrial of said case, provided the judgment of the District Court of the United States for the Southern District of New York is reversed by the said United States ~~Circuit~~ Court of Appeals; and shall not depart the jurisdiction of the District Court of the United States for the Southern District of New York without leave, then this recognizance to be void, otherwise to remain in full force, virtue and effect.

And we, the undersigned Principal and Surety, do hereby STIPULATE, AGREE, AND CONSENT, that in case the aforesaid Recognizance shall be forfeited judgment may be entered for the sum set forth in said Recognizance, and that execution issue thereon according to law.

/s/ Gilbert Green
Principal.

/s/ Robert W. Dunn
Surety.

Acknowledged before me the day and year first above written.

Clerk, U.S.District Court,
Southern District of New York.

Edward Wm. Donald
U. S. Commissioner
Southern District of New York

[fol. 76] GOVERNMENT'S EXHIBIT No. 5

120-2 N/S Clerk's Signature (Gen'l)

JBK:EJA-c

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 128-87

UNITED STATES OF AMERICA

—v—

JOHN B. WILLIAMSON, HENRY WINSTON, CARL WINTER, JOHN GATES, JACOB STACHEL, EUGENE DENNIS, BENJAMIN J. DAVIS, JR., ROBERT G. THOMPSON, IRVING POTASH, GILBERT GREEN, GUS HALL, Defendants.

NOTICE OF SETTLEMENT

SIR:

PLEASE TAKE NOTICE that the within Order on Mandate will be presented for settlement and signature to the Clerk of the United States District Court at his office in the U. S. Court House, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of July 1951, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, N. Y. July 1951.

Yours, etc.,

IRVING H. SAYPOL,
United States Attorney,
Southern District of New York.
Attorney for United States.
Office & P. O. Address:
U. S. Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

Abraham Isserman,
401 Broadway, Room 1602,
Attorney for John B. Williamson
and Gilbert Green.

[fol. 77] Louis McCabe,
401 Broadway, N.Y.,City
Attorney for Henry Winston

George Crockett,
401 Broadway, N.Y.City,
Attorney for Carl Winter
and Jacob Stacher

Harry Sacher,
401 Broadway, N.Y.City,
Attorney for John Gates and
Irving Potash

Richard Gladstein or
Max M. Kaufman,
401 Broadway,
Attorney for Robert G. Thompson
and Gus Hall

David M. Freedman
(Unger, Freedman & Fleischer)
~~100 Fifth Ave.~~, N.Y.City.
11 Park Place

Eugene Dennis, pro se,
420 West 119th St., N.Y.City

Benjamin J. Davis, Jr., pro se,
1 West 126th St., N.Y.City

[fol. 78] JBK:FJA:c

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 128-87

UNITED STATES OF AMERICA

—v—

JOHN B. WILLIAMSON, HENRY WINSTON, CARL WINTER, JOHN GATES, JACOB STACHEL, EUGENE DENNIS, BENJAMIN J. DAVIS, JR., ROBERT G. THOMPSON, IRVING POTASH, GILBERT GREEN, GUS HALL, Defendants.

ORDER ON MANDATE

A judgment of conviction and sentence having been entered herein against the above named defendants and an appeal from said judgment having been taken to the United States Court of Appeals for the Second Circuit, and the said United States Court of Appeals having affirmed said judgment and certiorari having been granted by the Supreme Court of the United States, and the Supreme Court of the United States having filed its mandate herein on 2nd day of July, 1951, affirming the judgment of the United States Court of Appeals for the Second Circuit and remanding the case to this Court for further proceedings in conformity with its opinion,

Now, on motion of IRVING H. SAYPOL, United States Attorney for the Southern District of New York, it is hereby

ORDERED, ADJUDGED and DECREED that the mandate of the Supreme Court of the United States be and the same hereby is made the order and judgment of this Court, and it is [fol. 79] FURTHER ORDERED, ADJUDGED and DECREED that the defendants personally surrender to the United States Marshal for the Southern District of New York; in Room 318, United States Court House, Foley Square, New York,

N.Y., on the 2nd day of July, 1951, at 11.05 o'clock in the forenoon of that day.

Dated: New York, N.Y., July 2 1951.

/s/ Sylvester J. Ryan
U. S. D. J.

[fol. 80] June 28th, 1951.

Original
Admissions of Service.

Copy Received.

Defendants.	*Attorneys.*
John B. Williamson,	/s/ A J Isserman per HS.
Henry Winston,	/s/ Louis F McCabe per HS.
Carl Winter,	/s/ Geo. W Crockett Jr. per HS.
John Gates,	/s/ Harry Sacher
Jacob Stachel,	/s/ Geo. W Crockett Jr. per H.S.
Eugene Dennis,	
Benjamin J. Davis, Jr.	
Robert G. Thompson,	/s/ Richard Gladstein per HS.
Irving Potash,	/s/ Harry Sacher
Gilbert Green,	/s/ A J Isserman per HS.
Gus Hall,	/s/ Richard Gladstein per HS
	/s/ David M. Freedman per A V.

6/28/51
6 P. M.

[fol. 81] Civil Dkt.—Aff. Personal Service

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C128-87 App. 4-265

UNITED STATES OF AMERICA

vs.

EUGENE DENNIS

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK.

Edward O'Brien being duly sworn, deposes and says that he is employed in the office of IRVING H. SAYPOL, United States Attorney for the Southern District of New York, attorney for the Appellee herein.

That on the 28th day of June 1951, he did serve a true copy of the hereto annexed Order on Mandate on EUGENE DENNIS, by leaving a true copy of the same under door of Apt. 61, at 420 W. 119 St. New York, N.Y., there being no one present who was authorized to give an admission of service.

/s/ Edward O'Brien

Sworn to before me this
29th day of June 1951.

/s/ Daniel Tanenbaum

DANIEL TANENBAUM
Notary Public, State of New York
No. (Illegible)
Qualified in Kings County
Certified with Kings & N. Y. Co. Clerks
Term expires March 30, 195

[fol. 82] Civil Dkt.—Aff. Personal Service

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C128-87 App. 4-265

UNITED STATES OF AMERICA

vs.

BENJAMIN J. DAVIS, JR.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK.

Edward O'Brien being duly sworn, deposes and says that he is employed in the office of IRVING H. SAYPOL, United States Attorney for the Southern District of New York, attorney for the Appellee herein.

That on the 28th day of June 1951, he did serve a true copy of the hereto annexed Order on Mandate on Benjamin J. Davis, by leaving a true copy of the same under door of Apt. 3 B, at #1 West 126 St., New York, N. Y. there being no one present who was authorized to give an admission of service.

/s/ Edward O'Brien

Sworn to before me this
29th day of June 1951.

/s/ Daniel Tanenbaum

DANIEL TANENBAUM
Notary Public, State of New York
No. (Illegible)
Qualified in Kings County
Certified with Kings & N. Y. Co. Clerks
Term expires March 30, 195

[fol. 82] GOVERNMENT'S EXHIBIT 6

IHS:FA
110925

Bench Warrant

TO THE MARSHAL OF THE UNITED STATES,

for the Southern District of New York, or any other United States Marshal or authorized officer, and to his deputies, or any or either of them.

WHEREAS, at a District Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the Borough of Manhattan, in the City of New York, within and for the District and Circuit aforesaid, on the 20th day of July in the year of our Lord one thousand nine hundred and forty-eight the Grand Jurors in and for the said District and Circuit, brought into the said Court a true Bill of Indictment against Gilbert Green for having, on the 1st day of April 1945 at the Southern District of New York and within the jurisdiction of this court did unlawfully conspired to organize the Communist Party to advocate the overthrow and destroy the Government of the United States by force and violence in violation Ti.18 Sec.10 USC Ti.18 Sec.11 and 13 USC commonly known as the Smith Act.

as by said Indictment, now remaining on file and of record in the said Court, may more fully appear; to which Indictment the said Gilbert Green has pleaded Not Guilty and been convicted on October 14, 1949 and on October 21, 1949 the said defendant having been sentenced to be imprisoned for a term of five years and to pay a fine of $10,000 to stand committed until fine is paid or he is otherwise discharged according to law and the United States Supreme Court having filed its mandate on July 2, 1951, affirming judgment of the District Court.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States of America, to appre-

[fol. 84] hend the said Gilbert Green and him bring before the said Court, at the U. S. Court House Building, in the City of New York and surrender him to the United States Marshal for commitment.

WITNESS; the HON. John C. Knox Judge of the District Court of the United States, for the Southern District of New York, at the Borough of Manhattan, in the City of New York, the 2nd day of July in the year of our Lord one thousand nine hundred and fifty-one.

IRVING H. SAYPOL
U. S. Attorney.

WILLIAM V. CONNELL
Clerk.

[SEAL]

A TRUE COPY OF A WARRANT ISSUED

William V. Connell
Clerk.

[fol. 85] GOVERNMENT'S EXHIBIT 9

FOR IMMEDIATE RELEASE February 23, 1956

Attention: *Editor*

STATEMENT OF GIL GREEN, COMMUNIST LEADER

On Monday, February 27th at 12 noon I shall cease being a fugitive from injustice and instead become its prisoner. At that time, I shall appear at Foley Square.

The reason I am taking this step is that the main trend of the nation is no longer toward a new world war and McCarthyism. A new trend is evident. This is true even if our discredited Secretary of State still brags about bringing the country repeatedly to the brink of war and our modern Cotton Mathers still pursue their witch-hunts.

New political winds are blowing. These give hope that the curtain of fear behind which democratic liberties were undermined and destroyed will be lifted. They also give reason for confidence that the day is not far off when the

political rights of Communists will be restored and men and women of differing political persuasions will be able, once again, to debate their views openly and freely in the public arena.

The course I chose five years ago was not dictated by personal considerations. In many ways it was harsher than that of imprisonment. It meant added hardship and suffering both for myself and my family. It entailed not only cruel separation, but the greater agony of complete severance from loved ones.

And yet, so long as there was a grave danger that this country would be dragged into a senseless world slaughter and toward an American brand of fascism, it seemed incumbent upon me to resist that trend with every ounce of strength I possessed. Some could do so by going to jail; others by not.

Before the steel doors of political bigotry clang shut behind me I am filing my own political brief before the highest court in the land—the court of public opinion. This is in the form of the manuscript of a book which I have just completed and am forwarding to possible publishers under the title *The Enemy Forgotten*. In this I endeavor to explain why it is that the American people—essentially progressive-minded—permitted our land to be taken down the hated road of repression and how the nation can be brought back to the path of progress.

I enter prison with head high and conscience clear. I have committed no crime against any of my fellow men or against my country. I know that the day will come when all America will recognize this to be true. I am also convinced that the day will come when prison doors swing open, for there will be no "cold war" and, therefore, no "cold war" political prisoners.

s/ Gil Green

[fol. 86] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 128-87

C 149-268

UNITED STATES OF AMERICA, Petitioner,

v.

GILBERT GREEN, Respondent.

APPEARANCES:

Paul W. Williams, United States Attorney for the Southern District of New York
Attorney for Petitioner
Thomas A. Bolan, Assistant U.S. Attorney
Of Counsel

John J. Abt, of New York, N.Y.
Attorney for Respondent

OPINION—April 16, 1956

DAWSON, *D.J.*:

This proceeding was brought on by an order to show cause duly served upon the respondent directing him to show cause why he should not be adjudged and held in criminal contempt of this Court by reason of the fact that he knowingly and deliberately disobeyed and resisted a lawful order and command of this Court directing him to appear before it on July 2, 1951 and July 3, 1951 for surrender in execution of the judgment and sentence imposed under indictment C 128-87.

Respondent was convicted in this Court, after a long trial before Judge Medina, of conspiring to teach and [fol. 87] advocate the overthrow of the government by force and violence, 18 U.S.C.A. §2385, and pending appeal from his conviction, was ordered released on bail. The conviction was sustained by the Court of Appeals, 183 F. 2d 201, and on June 4, 1951, the Supreme Court affirmed his con-

viction. *Dennis* v. *United States*, 341 U.S. 494. A proposed order on mandate requiring his appearance for surrender to the United States Marshal on July 2, 1951 was served upon his counsel on June 28, 1951. Respondent did not appear on July 2, 1951, and attempts thereafter to execute a bench warrant at his stated address failed.

Respondent was arraigned and pleaded not guilty to the charge of contempt, and the issues were tried by the Court without a jury pursuant to Federal Rules of Criminal Procedure, Rule 42.

The evidence showed that the order of Judge Ryan of July 2, 1951 required the respondent to surrender personally to the United States Marshal for the Southern District of New York. There is no doubt that respondent did not surrender for over four years, or not until February 27, 1956 when he surrendered himself for commitment at the United States Courthouse in New York, N. Y.

The evidence was sufficient to establish, beyond a reasonable doubt, that the respondent knowingly disobeyed the order of Judge Ryan. The evidence showed that Mr. Sacher, an attorney in the case, personally advised the respondent on June 29th that he had to be in Court on July 2, 1951. There was other evidence that thereafter, but before July 2, respondent left his New York City [fol. 88] address and was not seen there again. There was further evidence that several days before respondent surrendered, he issued a written statement to the press admittedly signed by him which conclusively established that he had remained in hiding in order to avoid serving the sentence to which he had been committed. Furthermore, on the day on which he surrendered, respondent made statements to the reporters who were present on the Courthouse steps which also conclusively established that he had knowingly and willfully absented himself so as to avoid serving a sentence which he knew had been imposed upon him.

From the testimony, the Court found as a fact that respondent had notice of the order and willfully disobeyed it. See *United States* v. *Gus Hall*, 198 F. 2d 726 (C.A. 2, 1952), cert. den. 345 U.S. 905 (1953).

Respondent then contended that the Court was without power to impose a sentence for contempt of Court of more

than one year, and this opinion deals primarily with that question.

§401 of 18 U.S.C. provides that

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> • • •
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

It is the argument of the respondent that this provision is not a grant of unlimited power to the Court, but that the [fol. 89] discretion of the Court is confined to punishment for a misdemeanor, as defined in §1 of Tit. 18 U.S.C., i.e., a crime punishable by imprisonment for not more than one year. Respondent argues that at Common Law, contempt was considered to be a misdemeanor; and that if §401 is construed to authorize the punishment of contempt by a term of more than one year, it would violate that provision of the Fifth Amendment to the United States Constitution which provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

This argument presupposes that criminal contempt is an "infamous crime" within the meaning of those words as used in the Fifth Amendment.

While, for certain purposes, contempt cases may be considered criminal cases, it has been well established that "proceedings in contempt may be said to be sui generis". *O'Neal* v. *United States*, 190 U.S. 36 (1903).* The Court of Appeals for the Eighth Circuit in a case which raised the point now urged by the respondent decided that a criminal contempt is an "offense" and that the sentence imposed might exceed a year in the penitentiary. *Creekmore* v. *United States*, 237 F. 743 (1916).

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* See to same effect *Bowdon* v. *Bowdon*, 278 S. W. 2d 670 (Sup. Ct. Tenn. 1955).

The argument that the English courts at the time of the adoption of the original Judiciary Act of 1789 considered criminal contempts as misdemeanors is not persuasive. In [fol. 90] those days, many crimes which were considered misdemeanors were punished by sentences much more severe than one year in the penitentiary. In fact, in those days, the fact that a crime was a felony implied in law that it was punishable by capital punishment even if the statute prescribed no penalty. Blackstone, *Commentaries on the Laws of England* (1765-9) Vol. IV, p. 98. Consequently, characterization of an offense as a misdemeanor meant merely that it was not punishable by capital punishment and not, as respondent contends, that it was punishable by imprisonment of no more than one year. Blackstone, with reference to the punishment for contempt, states as follows:

> "If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or *infamous* punishment." Vol. IV, p. 287 (emphasis added).

The respondent argues that by virtue of the Common Law, a criminal contempt is a misdemeanor and hence is not punishable by a sentence of more than one year under 18 U.S.C. §1. This argument involves a misapprehension of §1. This section does not state that if a crime is a misdemeanor it may not be punished by a sentence of in excess of one year. Rather, the section provides the reverse, that if the allowable punishment is one year or less, the crime is a misdemeanor. Thus, it is the penalty which governs the classification and not any characterization or classification given by the Common Law or by a statute which governs the penalty. *Ex parte Brede*, 279 F. 147, 149 (E.D.N.Y. 1922), aff'd 263 U.S. 4 (1923).

[fol. 91] The point urged by respondent depends not so much upon the penalty which might be imposed but rather upon the question as to whether contempt was at the time of the framing of the Constitution considered as that type of "infamous crime" which at Common Law was triable by a jury.

While it has been said by distinguished authors that up to 1720, cases of contempt in England, when committed not

in the presence of the Court or by persons officially connected with the Court, were tried by a jury, there is no indication that this procedure was followed after 1720.*

Blackstone, whose *Commentaries* probably did much to influence the thinking of American lawyers at and before the time of the framing of the Federal Constitution, pointed out that:

> "A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal." (Vol. IV, p. 286)

That contempts, insofar as punishment is concerned, were sui generis and were not "infamous crimes" within the meaning of the Fifth Amendment has been recognized over the past century and a half. As early as 1812, the Supreme Court of the United States pointed out that the United States Courts had no Common Law jurisdiction in criminal cases, and that their jurisdiction must, in each [fol. 92] case, depend upon a statute, except that the power to fine or imprison for contempt is a power which necessarily resides in the courts of justice from the nature of their institution and does not depend upon statute. *The United States* v. *Hudson and Goodwin*, VII Cranch 32 (1812). In 1811, the Court for the Trial of Impeachments and the Correction of Errors of the State of New York held:

> "A contempt is an offense against the court, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same be punishable as a crime or misdemeanor, on indictment, or not." *Yates* v. *Lansing*, 9 Johns. 395, 417 (1811).

Cooley in *Constitutional Limitations* (8th Ed. 1927), p. 668, Note 2, states:

> "The power to punish contempts summarily is incident to courts of record, and the courts have generally held

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* "*Power of Congress over Procedure in Criminal Contempts*", Frankfurter and Landis, 37 Harv. L. Rev. 1010 at 1042 (1924).

that cases of contempt are not triable by jury. The objects of the power would be defeated in many cases if they were."

The power to punish for contempt is not controlled by the Constitution as to modes of accusation and methods of trial. *In re Michael*, 146 F. 2d 627 (C.A. 3, 1944), rev'd on other grounds 326 U.S. 224 (1945). A Court in enforcing obedience to its orders by proceedings for contempt "is not executing the criminal laws of the land" nor in such a proceeding is there "any invasion of the constitutional right of trial by jury". *In re Debs*, 158 U.S. 564, 594, 596 (1895); see *United States* v. *United Mine Workers*, 330 U.S. 258 at p. 298 (1947).

Whether the right of trial by jury for criminal contempt should be granted by appropriate amendment to the stat [fol. 93] ute or rule is a matter which appropriately may be argued. *"Contempt of Court, Criminal and Civil"*, Joseph H. Beale, Jr., 21 Harv. L. Rev. 161 (1908); *"Civil and Criminal Contempt in the Federal Courts"*, 57 Yale L. Journal 83 (1947).

However, no such argument was made by the respondent. He limited his argument solely to the extent of the sentence. Such sentence, it has been established, rests solely in the sound discretion of the Court, subject only to the Constitutional provision against cruel and unusual punishment. *United States* v. *Lederer*, 140 F. 2d 136 (C.A. 7, 1944). Thus, in *Hill* v. *United States ex rel. Weiner*, 300 U.S. 105 (1937) a two-year sentence was affirmed; in *Conley* v. *United States*, 59 F. 2d 929 (C.A. 8, 1932), a two year sentence was affirmed; in *United States* v. *Hall*, 198 F. 2d 726 (C.A. 2, 1952), cert. den. 345 U.S. 905, a three year sentence was affirmed; in *United States* v. *Thompson*, 214 F. 2d 545 (C.A. 2, 1954), a four-year sentence was affirmed.

In the exercise of the discretion residing in the Court, the respondent has been sentenced to three years in the penitentiary following the completion of the five-year sentence which was originally imposed upon him.

Dated: New York, N.Y.
April 16, 1956

Archie O. Dawson, U.S.D.J.

[fol. 94] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 149/268

UNITED STATES OF AMERICA

v.

GILBERT GREEN

JUDGMENT AND COMMITMENT—March 26, 1956

On this 26th day of March, 1956 came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant has been convicted upon[2] the Court adjudging him guilty of contempt of Court after trial, by reason of the fact that he disobeyed and resisted lawful orders and commands of this Court directing him to appear before it on July 2, 1951 as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Three Years

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be

[3] Insert "in count(s) number " if required

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and,

Sentence to be served consecutively to and begin after service of sentence he is presently serving on Cr 128 87

Writ Satisfied.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Archie O. Dawson, United States District Judge

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if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

* Enter any order with respect to suspension and probation.

* For use of Court wishing to recommend a particular institution.

[fol. 95] United States Court of Appeals
For the Second Circuit

Nos. 45 and 46—October Term, 1956.
(Argued January 17, 1957.)
Docket Nos. 24103, 24104

The United States of America, Petitioner-Appellee,

v.

Gilbert Green, Respondent-Appellant.

The United States of America, Petitioner-Appellee,

v.

Henry Winston, Respondent-Appellant.

Opinion—February 11, 1957

Before: Hand, Hincks and Waterman, Circuit Judges.

Appeals from Judgments of the District Court for the Southern District of New York (Dawson, *J.*, presiding), sentencing the appellants to three years imprisonment for criminal contempt.

[fol. 96] JOHN J. ABT, for the Appellants.
THOMAS A. BOLAN, for the Appellee.

HAND, Circuit Judge:

The appellants, Green and Winston, appeal from sentences of three years imprisonment under the following circumstances. Each was one of a number of defendants convicted of a violation of §2385 of Title 18, U. S. C., commonly known as the "Smith Act," after a long trial which ended on October 14, 1949; we affirmed the judgment on August 1, 1950, and the Supreme Court did the same on June 4, 1951. On the mandate of the Supreme Court's affirmance an order issued out of the District Court, directing all the defendants to appear for surrender to the marshal on July 2, 1951, and on June 28 it was served upon the attorney for the appellants who had both been released on bail pending the appeals. They did not appear on the return day, and successfully evaded arrest until they eventually surrendered, Green in February 1956 and Winston in March. These proceedings to punish them for disobedience of the order of June 28, 1951, were begun against them before Judge Dawson, who after a hearing without a jury on March 26, 1956, sentenced each to a term of three years, cumulatively upon the original sentence of five years. Upon these appeals, which involve the same questions and may be decided together, three questions arise: (1) Whether the District Court has power to impose any sentence of more than one year for disobedience of its orders; (2) whether it had any power whatever to sentence these particular appellants for failure to surrender in response to the order of June 28, 1951; and (3) whether there was evidence enough to fix them with notice of that order before their surrender. Believing that our decisions in *United States* v. *Hall*, 198 F. 2d 726 and *United States* v. *Thompson*, [fol. 97] 214 F. 2d 545, foreclose our consideration of the second and third questions, the appellants do not press them here, explicitly reserving, nevertheless, the right to do so should the cases come before the Supreme Court. Although in these two decisions we affirmed sentences of three and four years, we will assume, *arguendo*, that the first point, unlike the second and third, remains open.

The following is the first of the appellants' two arguments in support of the position that the sentences for more than one year were invalid. The Supreme Court definitively held in *Ex parte Wilson*, 114 U. S. 417, 429, that "a crime punishable by imprisonment for a term of years at hard labor is an infamous crime"; and it is no longer necessary that the feature of "hard labor" be added, if the confinement may be in a penitentiary. *Mackin* v. *United States*, 117 U. S. 348, 352; *In re Claasen*, 140 U. S. 200, 205. The punishment for any crime punishable by a sentence of more than a year, may be by confinement in a penitentiary (§4083, Title 18, U. S. C.); and it follows that a sentence for disobedience of a court order may not be for more than a year, for in that event it is an "infamous crime," and must be prosecuted by indictment under the Fifth Amendment.

Concededly, this argument depends upon whether such disobedience is a "crime" within the meaning of the Fifth Amendment. In a civil action ordinarily the proceeding is only remedial and imprisonment is imposed only to coerce compliance;* but it may also be punitive, provided its penal character be clearly enough disclosed from the outset.** Moreover, that is true *a fortiori* when the order, as here, issues as a step ancillary to a criminal prosecution. *Gompers* v. *United States*, 233 U. S. 604, 610, was a civil [fol. 98] action in which the imprisonment for disobedience was purely punitive, and Holmes, *J.*, speaking for the court used the following language:

> "It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in

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* *United States* v. *Baird* (C. A. 2), February 4, 1957.

** *In re Kahn*, 204 F. 581 (C. A. 2); *In re Guzzardi*, 74 F. 2d 671 (C. A. 2); *McCann* v. *New York Stock Exchange*, 80 F. 2d 211 (C. A. 2).

> English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, * * * and that at least in England it seems that they still may be and preferably are tried in that way."

Nevertheless, in spite of this statement there has been much confusion in the language used by the courts to describe criminal contempts; for certainly they have not consistently been called "crimes." Apparently by reason of faulty history, it became the prevailing belief about the end of the 18th Century that disobedience of court orders might be treated summarily without a jury, which would not have been possible had the Sixth Amendment applied to it. In any event so much has become well settled;* and the resulting confusion was enough to provoke Chief Justice Vinson, then speaking for the Court of Appeals of the District of Columbia, to say: "we see no advantage in rehashing the discussions on whether criminal contempt is sui generis," [which had been a favorite [fol. 99] evasion], "offense, crime or felony. Criminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes, and some of it is not." **

Nevertheless, confused as the thinking no doubt has been one thing seems certain: it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be begun by an indictment, and yet that it need not be tried to a jury. It would be even more unwarranted to make the right to a jury depend upon whether the imprisonment is more than a year; for the Sixth Amendment covers all "criminal prosecutions," except those for "petty offenses." † Perhaps all the decisions have been wrong that have held that disobedience may be so tried; but, if so, we may not overrule them; and indeed, when Congress in 1954 enacted §3146 of Title 18 it expressly declared: "Nothing in this section shall inter-

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* *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 38; *In re Debs*, 158 U. S. 564, 596; *Myers* v. *United States*, 264 U. S. 95, 113; *United States* v. *United Mine Workers*, 330 U. S. 258, 296.

** *Warring* v. *Huff*, 122 F. 2d 641.

† Section 1(3), Title 18, U. S. C.

fere with or prevent the exercise by any court of the United States of its power to punish for contempt." That was a recognition of the power as it had then developed.

The appellants' second point is that in any event §24 of the Clayton Act limited the permissible imprisonment for criminal contempts to a year. This argument runs as follows. Before 1914 there was no recorded decision of any sentence of more than a year for a criminal contempt, though there had been extremely large fines. That section was one of three—21, 22 and 24—the first two of which provided for the trial for disobedience of orders or judgments when "the act or thing" was a "criminal offense under any statute of the United States, or under the laws of any State in which the act was committed." The trial must then be to a jury. Section 24 provided that although §§21 [fol. 100] and 22 should apply to such contempts, "all other cases of contempt * * * may be punished in conformity to the usages at law and in equity now prevailing." This remained unchanged until the Act of 1948, when this passage, then a part of the last paragraph of §402, Title 18, was changed to read: "may be punished in conformity to the prevailing usages at law." Although there had been decisions between 1914 and 1948 (this argument continues), in which courts had affirmed sentences longer than one year, these were mistakes, because §24 by incorporating into the statute the usages then "prevailing," forbad longer sentences. Moreover, the change in 1948 from "usages at law and in equity now prevailing" to "prevailing usages at law" is not to be understood to indicate any change in the scope of the statute, for it was the declared purpose of the Revisers not to change its "meaning or substance."

This reasoning also does not convince us. There is no reason to suppose, because courts had not up to 1914 imposed imprisonment for more than a year, that they thought they had not the power to do so. There would have been no basis for such a conclusion except the constitutional argument that we have just held invalid, and there is not in the books a syllable of recognition of any such supposed limitation. The "usages now prevailing" meant practices that the courts for one reason or another thought controlling, not limitations that, so far as appears, they thought

the particular occasion demanded on the merits. The language of 401 has always been in substance as it reads now: a "court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority," etc. The phrase "at its discretion," does not mean that the court must choose between fine and imprisonment; the word "or," itself provides as much and the words, if so construed, would have been redundant. The term of imprisonment is to be as much in the court's [fol. 101] discretion as the fine. Besides, whatever may have been the longest sentence up to 1914, certainly during the ensuing period of 34 years up to 1948, in at least four instances sentences of more than a year were affirmed for the very reason that the length of imprisonment was to be determined at the court's "discretion." * The same is true of four decisions of courts of appeals after 1948, all of which, like the four earlier ones, declared, though briefly and without discussion, that the court's discretion had not been abused.**.

Thus there has been an unbroken line of authority contrary to the proposition that 4 24 put a year's limit upon the imprisonment. Moreover, by the Act of 1954, of which we have spoken, Congress provided that a person who was admitted to bail, and who failed to appear, became subject to imprisonment for five years, when tried to a jury, if the charge on which he was bailed was a felony; but for only one year, if the charge was a misdemeanor. Therefore, if the court's summary power is limited to one year's imprisonment in the case of felonies, the result is that, when the defendant is charged with a felony and "jumps bail," he may be imprisoned for five times as long if he is tried to a jury as he can be, if he is tried to a judge; but when he is charged with a misdemeanor, it makes no difference whether he is tried to judge or jury. It is hard enough to see why the maximum punishment for the same offence

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* *Creekmore* v. *United States*, 237 F. 743 (C. C. A. 8); *Conley* v. *United States*, 59 F. 2d 929 (C. A. 8); *Warring* v. *Huff*, *supra* (122 F. 2d 641 (C. A. D. C.); *United States* v. *Lederer*, 140 F. 2d 136, 139 (C. A. 7).

** *United States* v. *Hall*, *supra*; *United States* v. *Thompson*, *supra*; *Nilva* v. *United States*, 227 F. 2d 74 (C. A. 8); *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8).

should depend upon the mode of trial; but it is impossible to suppose that so great a disparity should have been in [fol. 102] tended when the offender was charged with "jumping bail" in a prosecution for felony, but that no disparity whatever should have been intended when he did the same in a prosecution for a misdemeanor. Moreover, the Senate Report (U. S. Code Congressional and Administrative News, 1954, Vol. II, p. 3074) declares that the "proposed legislation seeks to create a statutory deterrent which will minimize the possibility of bail forfeiture"; and it is extremely unlikely that so great an increase as five to one would not have been mentioned, if it had been supposed that the existing maximum in felonies was only a year.

Finally, in view of this statute, especially directed as it is against this particular kind of disobedience, we cannot hold that three years was an abuse of discretion, when we remember that in *United States* v. *Hall*, *supra* (198 F. 2d 726) and *United States* v. *Thompson*, *supra* (214 F. 2d 545), we sustained as long, or longer, sentences.

We do not see that either Criminal Rule Seven or Rule Forty-two, needs any discussion, if what we have said is true.

Judgments affirmed.

[fol. 103] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Petitioner-Appellee,

v.

GILBERT GREEN, Respondent-Appellant.

JUDGMENT—February 11, 1957

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk

[fol. 104] United States Court of Appeals
For the Second Circuit

United States of America, Plaintiff-Appellee,

v.

Henry Winston, Defendant-Appellant.

Judgment—February 11, 1957

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk

[fol. 105] Clerk's Certificate to Foregoing Transcript
(omitted in printing)

[fol. 106] Supreme Court of the United States

Order Allowing Certiorari—Filed May 27, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U.S.
APR 4 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 100

GILBERT GREEN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

HENRY WINSTON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1956

No.

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GILBERT GREEN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

HENRY WINSTON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

o

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Gilbert Green and Henry Winston, petition that writs of certiorari issue to review judgments of the United States Court of Appeals for the Second Circuit which affirmed judgments of the United States District Court for the Southern District of New York convicting each petitioner of criminal contempt of an order requiring him to surrender for commitment, and sentencing each to

imprisonment for three years following completion of the five year sentence imposed on him in *United States v. Dennis*, 341 U. S. 494 (G.R. 109; W.R. 82).[1]

The two cases involve similar facts and identical questions of law and were consolidated for briefing and argument in the Court of Appeals which disposed of them in a single opinion.

Opinions Below

The opinion of the Court of Appeals has not yet been reported. The opinion of the District Court in the *Green* case appears at 140 F. Supp. 117. Both opinions are set forth in App. A, *infra*, pp. 25, 32.[2]

Jurisdiction

The judgments of the Court of Appeals are dated and were entered on February 11, 1957. On February 21, 1957 an order was entered by Mr. Justice Harlan extending the time for filing the petition for certiorari to April 12, 1957. Jurisdiction of this Court is conferred by 28 U. S. C. 1254.

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[1] "G.R." and "W.R." refer to the records from the court below in the *Green* case and the *Winston* case respectively. Neither record has been printed. "G.G. Ex." designates a government exhibit in the *Green* case and "W.G. Ex." a government exhibit in the *Winston* case. "App." refers to an appendix to this petition.

[2] We refer to the opinion of the Court of Appeals as "C.A. Op." and to the opinion of the District Court in the *Green* case as "D.C. Op." The District Court did not write an opinion in the *Winston* case.

Questions Presented

1. Whether a criminal contempt may be punished by a prison sentence of more than one year.

2. Whether there was evidence that petitioners had knowledge of the existence of the order which they were convicted of disobeying.

3. Whether disobedience of an order requiring a convicted defendant to surrender for commitment is punishable as a contempt.

4. Whether it was an abuse of discretion to sentence petitioners to imprisonment for three years.

Statutes Involved

The pertinent statutes are set forth in App. B, *infra*, p. 39.

Statement of the Case

The proceedings against petitioners were initiated by orders to show cause supported by affidavits (G.R. 88-93; W.R. 65-68). Specifications subsequently filed charged that each petitioner had committed contempt by wilfully and knowingly disobeyed an order of the District Court, entered July 2, 1951, requiring him to surrender for commitment pursuant to the mandate of this Court in *Dennis* v. *United States*, *supra* (G.R. 98; W.R. 69).

The evidence showed that petitioners had been enlarged on bail pending appeal from their conviction in the *Dennis* case (G.R. 11; W.R. 13-14). On June 28, 1951, following affirmance of the convictions by this Court, the United States Attorney served petitioner's counsel with notice that on July 2 he would present to the District Court a

proposed order on mandate requiring petitioners to surrender for commitment on that date (G.R. 12, G.G. Ex. 3; W.R. 14-15, W.G. Ex. 4). Counsel for petitioners thereupon advised both men that they were required to appear before the District Court on July 2 (G.R. 15-16; W.R. 18).[3]

Neither petitioner appeared on July 2, at which time the proposed order requiring their surrender was entered and bench warrants were issued for their arrest (G.R. 12, G.G. Exs. 5, 6; W.R. 14-15, W.G. Exs. 4, 5). They were not apprehended but surrendered voluntarily, Green in February, 1956 and Winston in the following month (G.R. 22; W.R. 25). Immediately prior to surrendering, each petitioner mailed a statement to the press announcing his intention to give himself up and stating the reasons for his earlier failure to do so. Green made similar statements on the same subject in an interview with the press when he presented himself at the Court House. (G.R. 27-32, G.G. Ex. 9; W.R. 21-25.) It appears from these statements that, as their counsel conceded (G.R. 40-41; W.R. 43), both petitioners had fled to evade commitment. However, there was nothing in the statements or in any other evidence which indicated that, prior to his surrender, either petitioner had knowledge of the entry of the order of July 2, 1951 which he was charged with wilfully and knowingly disobeying.

Each petitioner moved to dismiss the proceeding against him on the grounds (1) that the court was without jurisdiction to convict a defendant of contempt for disobedience of an order requiring his surrender for commitment (G.R. 2-3; W.R. 3), and (2) that the evidence was insufficient to establish that petitioner had knowledge of the order of July 2, 1951 prior to his surrender (G.R. 39-40; W.R. 28). These motions were denied, as was the contention of peti-

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[3] Counsel had previously stated to the District Judge that all of the *Dennis* defendants would be present in court on July 2 (G.R. 14; W.R. 17).

tioners that the District Court was without power to impose a prison sentence for criminal contempt for a term in excess of one year (G. R. 6, 42, 65, W. R. 10-11, 34, 50-51).

In the Court of Appeals, petitioners limited their brief and argument to the question of the validity of the three year sentences since that court had previously decided the two additional issues raised at the trials adversely to petitioners in sustaining the contempt convictions of two other absconding *Dennis* defendants. *United States* v. *Hall*, 198 F. 2d 726, cert. den. 345 U. S. 905; *United States* v. *Thompson*, 214 F. 2d 545, cert. den. 348 U. S. 841. However, petitioners expressly reserved their right to present to this Court the issues not argued in the Court of Appeals (see C.A. Op., *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The trial court was without power to sentence petitioners to terms in excess of one year.

This case presents the question, not hitherto considered by this Court, whether the federal courts are authorized, at their discretion, to punish criminal contempts by prison sentences for any term, including life.[4] Petitioners contend that the federal courts do not have this unlimited discretion, but are restricted to the imposition of sentence as in the case of offenses which are not infamous.

An infamous offense is one which may be punished by confinement in a penitentiary. *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348. Since such confinement is authorized where the sentence is for

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[4] Subject only to the limitation, if any, imposed by the constitutional prohibition against "cruel and unusual punishment".

a term of more than one year, offenses punishable by a longer term are infamous. (See 18 U. S. C. 408[3]; Notes of Advisory Committee on Rules to Rule 7, Federal Rules of Criminal Procedure.) Accordingly, if contempt is not an infamous offense, it may not be punished by a sentence of more than one year."

Put in other words, it is petitioners' position that criminal contempts are misdemeanors and not felonies as these terms are defined in 18 U. S. C. 1.

18 U. S. C. 401, in language derived from section 7 of the Judiciary Act of 1789, 1 Stat. 73, 83, authorizes a federal court to punish contempts "by fine or imprisonment, at its discretion."[4] We shall show that if the term "imprisonment" as used in these statutes can be construed to embrace imprisonment in a penitentiary, the power to impose such punishment was denied the federal courts by section 24 of the Clayton Act, 38 Stat. 739 (codified in 18 U. S. C. 402) and by Rule 7 of the Federal Rules of Criminal Procedure. Moreover, to construe the contempt power as authorizing infamous punishment, would violate the clause of the Fifth Amendment requiring the prosecution of infamous crimes by indictment.

We turn first to the Clayton Act, adopted on October 15, 1914. Sections 21 and 22 of that Act relate to contempts for disobedience to orders of a federal court where the contemptuous conduct is also a criminal offense under state or federal law. Section 22 requires that contempts of this character be tried to a jury and fixes the maximum

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[3] Derived from the Act of March 3, 1865, 13 Stat. 500. See *In re Mills*, 135 U. S. 263, 270.

[4] Section 7 of the Judiciary Act of 1789 authorized the courts "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

punishment at imprisonment for six months and a fine of $1000. Section 24 of the same Act provides:[7]

> "Nothing herein [in sees. 21 and 22] contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, *but the same, and all other cases of contempt not specifically embraced within section 21 of this Act, may be punished in conformity to the usages at law and in equity now prevailing.*" (Emphasis supplied.)

Section 24 accomplishes two purposes. By its first clause, it excludes certain kinds of contempt (including the kind involved here) from the jury trial requirement and limitation on punishment contained in section 22. By its second clause (which we have italicized), it limits the punishment for contempts of the excluded categories to that which prevailed on October 15, 1914, the date of enactment of the Act.

The legislative history contains no discussion of the second clause of section 24, which we will refer to as the "prevailing usage clause."[8] But its language is plain and familiar principles of statutory construction require that it be given effect. *McDonald* v. *Thompson*, 305 U. S. 263, 266. Hence, the authority of the federal courts to

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[7] The substance of sections 21, 22 and 24 of the Clayton Act is now contained in 18 U. S. C. 402 and (as to jury trials) 18 U. S. C. 3691. (See *infra*, p. 8.)

[8] Congressman Clayton advised the House that contempts for disobedience of orders entered in actions to which the United States is a party were excepted from sections 21 and 22 so as not to weaken the power of the courts to enforce dissolution decrees in anti-trust cases. 48 Cong. Rec. 22591.

punish contempts of the classes described in section 24 must be determined by reference to the usage which prevailed in 1914.

The usage which prevailed, without exception, from 1789 until after the enactment of the Clayton Act was to punish contempts as offenses not infamous, *i.e.*, as misdemeanors. Prior to 1916,[3] there was no reported case in the federal or state courts of a sentence in excess of one year or other infamous punishment for contempt. In 1916, the Supreme Court of Iowa could state upon invalidating a statute authorizing a penitentiary sentence for contempt:

> "The authorities may be searched in vain for any precedent, under our constitutional form of government, holding it to be within the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt * * *." *Flannagan v. Jepson*, 177 Ia. 393; 158 N. W. 641, 643.

The effect of the prevailing usage clause of section 24 of the Clayton Act was to codify this century and a quarter of undeviating American practice and make it applicable to the classes of contempts to which the maximum sentence of six months provided by section 22 does not apply. Accordingly, these classes of contempts may not be punished as infamous offenses—*i.e.*, by prison terms of more than one year.

Congress incorporated the substance of section 24 of the Clayton Act into 18 U. S. C. 402 in the 1948 revision and codification of the criminal statutes. Section 402 substitutes the phrase "in conformity to the prevailing usages at law" for the original wording, "in conformity to the usages at equity and law now prevailing." This

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[3] The date of *Creekmore v. United States*, 237 F. 243, discussed *infra*, p. 10.

modification in phraseology, however, did not change the effect of the original enactment. It is well established that "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson v. Pacific Coast S.S. Co.*, 225 U. S. 187, 199.[9] The Reviser's Notes to section 402 specifically state that the differences in phraseology between that section and sections 22 and 24 of the Clayton Act "do not, however, change their meaning or substance." (18 U. S. C. A. 402, Reviser's Notes.)[10] It is clear, therefore, that section 402 did not change the date specified in section 24 of the Clayton Act for determining the "prevailing usage." Accordingly, section 402, like its predecessor, codifies the usage as to punishment which prevailed in 1914 and prohibits the courts from imposing contempt sentences in excess of one year.

The same limitation on the power of the federal courts to punish contempts is also imposed by Rule 7(a) of the Federal Rules of Criminal Procedure. The Rule provides that, "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment * * *." The Rules cover criminal contempts. (See Notes of Advisory Committee on Rules to Rule 1, and Rule 42.) Although the question whether criminal contempt is a "crime" has been much

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[9] Congress recognized that this rule of construction was applicable to the codification of Title 18. See report of Representative Keogh to the American Bar Association, 92 Cong. Rec., A-61, A-62.

[10] The Reviser's Notes to Title 18 were made an appendix to the House Committee Report, and the reports of both the House and the Senate Committees state that these Notes contain a detailed explanation of every change made in the text of prior legislation. H. Rept. No. 304, 80th Cong., 1st Sess., on H.R. 3190, p. 9; S. Rept. No. 1620, 80th Cong., 2d Sess., on H.R. 3190, p. 2. The Reviser's Notes are entitled to great weight in construing the legislation. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 255.

debated, it is plainly an "offense." *New Orleans* v. *The Steamship Company*, 87 U. S. 387, 392. The requirement of Rule 7 is therefore applicable to contempts. Since they never have been and, under Rule 42, are not prosecuted by indictment, they may not be punished by imprisonment for more than a year.

As we have seen, there was no reported instance of infamous punishment for contempt prior to 1916. Since that date, such punishment (*i.e.* a prison term of more than a year) has been imposed in eight reported cases: *Creekmore* v. *United States* (C. A. 8, 1916), 237 F. 743 (a year and a day); *Conley* v. *United States* (C. A. 8, 1932), 59 F. 2d 929 (two years); *Hill* v. *United States* (1937), 300 U. S. 105 (two years); *Warring* v. *Huff* (C. A. D.C., 1941), 122 F. 2d 641 (a year and a month); *United States* v. *Lederer* (C. A. 7, 1944), 140 F. 2d 136 (a year and a day); *United States* v. *Hall* (C. A. 2, 1952), 198 F. 2d 726 (three years); *United States* v. *Thompson* (C. A. 2, 1954), 214 F. 2d 545 (four years); *Lopiparo* v. *United States* (C. A. 8, 1954), 216 F. 2d 87 (eighteen months).[12]

The question of the power of the court to impose sentence of more than one year was not raised or considered in any of the foregoing cases except *Creekmore* v. *United States*. That case, decided two years after enactment of the Clayton Act, does not mention the prevailing usage clause of section 24 which evidently was not called to the court's attention. And since the decision antedated the Federal Rules of Criminal Procedure by many years, no consideration was given to the effect of Rule 7. Except for the decision below, the *Creekmore*

[12] In one additional case this Court vacated a contempt sentence of a year and a day: *Nilva* v. *United States*, — U. S. — (February 25, 1957). In a second case, a three year sentence was reversed on appeal. *Yates* v. *United States* (C. A. 9), 227 F. 2d 844. The power of the courts to punish contempts as felonies was not raised or considered in either case.

case is the only decision on the power of a federal court to impose a contempt sentence of more than a year.[13]

The court below rejected petitioners' construction of the prevailing usage clause of section 24 of the Clayton Act. It stated (C. A. Op., *infra*, p. 30) that, "The 'usages now prevailing' meant practices that the courts for one reason or another thought controlling, not limitations that, so far as appears, they thought the particular occasion demanded on the merits."

The first difficulty with this reasoning is that it accounts for a century and a quarter of uniform judicial practice as a coincidence. Surely, it is unreasonable to assume that the first one hundred and twenty-five years of our history presented no contempt case in which a court thought that sentence of more than one year was "demanded on the merits."[14] "There are other and far more plausible ex-

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[13] The history of the question under state law is illuminating. There are only two reported cases of infamous punishment for contempt, in both of which the sentences were invalidated on appeal. *Flannagan* v. *Jefson*, *supra*; *Brown* v. *State*, 89 Okla. Cr. 443, 209 P. 2d 715. In the latter, the court vacated a penitentiary sentence under a statute similar to 18 U. S. C. 401 on the ground that infamous punishment is unauthorized in the absence of an express provision making contempt a felony. In *Rogers Mfg. Co.* v. *Rogers*, 38 Conn. 121, it was stated as axiomatic that imprisonment for contempt must be in a common jail, and not in a penitentiary. Currently, the punishment of criminal contempts is regulated by statute in 30 states. In 19, the maximum jail term is thirty days or less; in 8, six months or less, and in 2, one year. Three states make contempts punishable as misdemeanors, and four have enacted provisions along the lines of section 401. The state statutes are summarized in Appendix C, *infra*.

[14] See, e.g., *United States* v. *Shipp*, 214 U. S. 386, 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a Negro prisoner in flagrant violation of its order that the custody of the prisoner remain in status quo pending review of his conviction.

planations for the undeviating practice of punishing contempts as offenses not infamous.

The practice may well have been the product of judicial self restraint, dictated by the summary nature of contempt procedure and the lack of a jury trial. Perhaps the constitutional question posed by the requirement that infamous crimes be prosecuted by indictment (*infra*, p. 14) lay in the background of judicial thought. Perhaps the courts entertained doubt as to whether section 7 of the Judiciary Act of 1789 and its successors authorized infamous punishment.[15] It seems obvious that it was considerations like these and not, as suggested below, the lack of a "particular occasion" which underlay the practice of treating contempts as misdemeanors.

Moreover, the court below failed to consider the purpose which animated the contempt provisions of the Clayton Act. Congress enacted them because of its recurring concern over judicial abuse and usurpation of power in contempt cases.[16] Section 22 modified the prior practice of punishment with respect to a specified class of contempts by

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[15] The court below thought that the words "at its discretion" in 18 U. S. C. 401 and similar phraseology in the earlier contempt statutes gave the courts unlimited power over the length and character of the prison sentence. But there is a countervailing consideration. Since the contempt statutes have always provided for fine *or* imprisonment in the alternative, the courts are without power to impose both penalties for the same contempt. *In re Bradley*, 318 U. S. 50. This limitation is intelligible if the power to imprison is restricted to jail sentences of relatively short duration. But the statute would violate common sense if construed to authorize either a fine or imprisonment for life, but to prohibit a sentence of a $500 fine and ten days in jail. And, of course, ambiguities in the statute will be resolved in favor of the accused. *United States* v. *Universal C.I.T. Credit Corporation*, 344 U. S. 218, 221.

[16] See Frankfurter and Landis, *Power of Congress over Procedure in the "Inferior" Federal Courts—A Study in the Separation of Powers*, 37 Harv. L. Rev., 1010.

limiting prison sentences to six months and fines to $1000. As we have seen, the first clause of section 24 excluded all other classes of contempts from the provisions of section 22. But section 24 did not stop there. Congress was evidently concerned with preventing innovations in the punishment of contempts of the excluded categories. It therefore added the prevailing usage clause to section 24, and thereby required the courts to adhere to the practice of punishing these contempts as misdemeanors and not as felonies.

The construction of the prevailing usage clause by the court below makes it a redundancy. For the court could not suggest any practice, other than the practice of punishing contempt as a misdemeanor, which the clause was designed to freeze into statutory law. The purpose of the clause could not have been to give Congressional sanction to the practice of trying contempts of the kind not covered by section 22 before a judge rather than a jury. That purpose was accomplished by the first clause of section 24 which makes the provisions of section 22 (including the provision for jury trials) inapplicable to such contempts. Hence, if the prevailing usage clause is not a limitation on the punishment for contempts not covered by section 22, it adds nothing to the first clause of section 24. But the prevailing usage clause may not be treated as surplusage. *McDonald* v. *Thompson*, *supra*.

The court below believed (C. A. Op., *supra*, p. 13) that the enactment in 1954 of 18 U. S. C. 3146 fortified its construction of section 24 and made consideration of Rule 7 of the Criminal Rules unnecessary. Section 3146 creates the crime of bail-jumping and punishes it by a maximum sentence of five years where the accused is bailed on a felony charge and one year where the charge is a misdemeanor. The reasoning of the court seems to be that Congress would not have specified a sentence of five years for the crime if it had thought that the maximum contempt

sentence for the same offense[17] was only one-fifth as long. Hence, the court concluded, neither section 24 nor Rule 7 could have been intended to place a one year limitation on contempt sentences.

But obviously the terms of a statute passed in 1954 can shed no light on what Congress intended by a statute passed in 1914. Much less can they illuminate the intention of this Court when it adopted the Criminal Rules in 1944. Moreover, even if section 3146 could be said to have any relevance to the question at hand, it would point to a conclusion contrary to the one drawn by the court. For it would be more reasonable to suppose that section 3146 was enacted because Congress thought a one year sentence inadequate for the offense and entertained doubt as to the power of the courts, in contempt proceedings, to punish it with greater severity.

We believe that we have shown, contrary to the decision below, that section 24 of the Clayton Act and Rule 7 of the Criminal Rules limit contempt sentences to terms of not more than a year and that the same limitation may be implicit in 18 U. S. C. 401. At the very least, we have demonstrated that this conclusion is tenable. If so, it should be adopted. For a contrary conclusion would give rise to a major constitutional question and violate the principle that, if possible, statutes should be construed to avoid constitutional problems. *United States* v. *Rumely*, 345 U. S. 41, 45.

The constitutional question which rejection of petitioners' contention would present is whether criminal contempt is a "crime" within the meaning of the clause of the Fifth Amendment requiring infamous crimes to be prosecuted by indictment. The Court has never been confronted with this question. But in *Gompers* v. *United States*, 233 U. S. 604, 610, it declared that if criminal contempts "are not

[17] The statute is broader than any possible reach of the contempt power since it makes bail-jumping a crime even though no order has been entered requiring the appearance of the accused.

criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." Accordingly, many constitutional and statutory provisions for the protection of those accused of crime have been held applicable to criminal contempts.[18] The one exception to the treatment of criminal contempts as crimes is the holding that they are not "criminal prosecutions" within the jury trial requirement of the Sixth Amendment. Although it is now recognized that this exception rests on an historical error,[19] it is perhaps too late in the day for judicial correction of the mistake. But certainly the error should not be perpetuated by extending its application to other constitutional guarantees.

The opinion below (C. A. Op., *infra*, p. 28) implicitly acknowledges that the constitutional question presented here is not free from doubt. But the court did not consider that the existence of the doubt was a factor to be considered in construing section 24 of the Clayton Act, Rule 7 of the Criminal Rules and 18 U. S. C. 401. It resolved the constitutional question against petitioners because "it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceedings must be by an indictment, and yet that it need not be tried to a jury." But petitioners' contention involves no such

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[18] The prohibition against double jeopardy, the privilege against being called as a witness, the right to a speedy trial, compulsory process and the assistance of counsel, the presumption of innocence, proof of guilt beyond a reasonable doubt, the pardon power of the President, and the statute of limitations applicable to crimes. *In re Bradley*, 318 U. S. 50; *Gompers v. Buck Stove and Range Company*, 221 U. S. 418; *Blackmer v. United States*, 284 U. S. 421; *Cooke v. United*, 267 U. S. 517; *Ex parte Grossman*, 267 U. S. 87; *Gompers v. United States*, 233 U. S. 604.

[19] A statement in an unpublished opinion by Wilmot, J., in *Almon's Case* (1765) that it was "immemorial usage" to punish all contempts summarily. See Fox, *The History of Contempt of Court* (1927) and Frankfurter and Landis, *supra*.

anomaly. If we are right, criminal contempts are not subject to infamous punishment, may not be punished by imprisonment for more than one year, and are therefore not infamous crimes within the Amendment.[*] Accordingly, they need not be prosecuted by indictment.

The statutory limitation for which we contend on the power to punish contempts avoids the constitutional question. It equates federal practice with that which prevails in every state (see ftn. 13, *supra*, and App. C, *infra*). Moreover, it implements the sound democratic principle stated by Mr. Justice Field that:

> "The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon anyone except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution * * *." *In re Bonner*, 151 U. S. 242, 259.

The question whether federal judges have unlimited discretion to fix the term of imprisonment for criminal contempt is obviously important. Its importance has been accentuated in recent years by the growing frequency of long penitentiary sentences in contempt cases. (See cases cited *supra*, p. 10.) Review of the question by this Court is therefore both necessary and timely.

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[*] In disposing of the constitutional question, the court below also relied on the saving clause of the bail-jumping statute (18 U. S. C. §3146) that, "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." The opinion states (C. A. Op., *infra*, pp. 28-29) that this clause "was a recognition of the power as it had then developed". But even if it can be said that the saving clause recognizes the existence of judicial power to impose *infamous* punishment for contempt, Congressional recognition of an unconstitutional power does not make the power constitutional.

2. There is no evidence that petitioners had knowledge of the existence of the order which they were convicted of disobeying.

Each petitioner was tried and convicted of "wilfully and knowingly disobeying" the order of the District Court of July 2, 1951, ordering all of the *Dennis* defendants to surrender for commitment on that day (G. R. 42, 46; W. R. 35, 39). Knowledge by petitioners of the existence of this order was therefore an essential element of the offense, which the prosecution was required to prove beyond a reasonable doubt. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444. No such proof was introduced.

All that the evidence established was the following. On June 28, 1951, after the affirmance of the *Dennis* conviction by this Court, counsel for petitioners told the District Judge that they would have their clients in court on July 2, at which time the United States Attorney was to present for signature an order requiring all of the *Dennis* defendants to surrender for commitment (G. R. 14, G. G. Ex. 5; W. R. 17, W. G. Ex. 4). On June 29, counsel informed petitioners that their presence in court on July 2 was required (G. R. 15; W. R. 18). Petitioners did not appear on that day, at which time the proposed order for their surrender was signed and bench warrants issued for their arrest (G. R. 12, G. G. Exs. 5, 6; W. R. 14-15, W. G. Exs. 4, 5).[21] Petitioners were not apprehended but surrendered voluntarily four years later (G. R. 22; W. R. 25). At the time of their surrender, petitioners made statements to the press which established that they had absconded in order

[21] The opinion of the Court of Appeals erroneously states (C.A. Op., *infra*, p. 25) that the order for petitioners' surrender was entered by the District Judge and served on counsel for petitioners on June 28. The facts are correctly stated in the opinion of the District Court (D.C. Op., *infra*, p. 32), and it appears from the order itself (G.G. Ex. 5; W.G. Ex. 4) that it was signed and entered on July 2.

to avoid service of their sentences. None of these statements, however, made any reference to the order of July 2 or contained any indication that petitioners knew that such an order had in fact been entered. (G. R. 27-32, 39; G. Ex. 9; W. R. 21-25; and see D. C. Op., *infra*, p. 33.) Thus, there was no evidence that petitioners knew of the existence of the order and, hence, no basis for finding that they had knowingly disobeyed it.

Nevertheless, the District Court found that the evidence established petitioners' knowing disobedience of the order beyond a reasonable doubt (D. C. Op., *infra*, p. 33; W. R. 37-38). In so doing, it followed the decision in *United States* v. *Hall*, *supra*, in which a majority of the Court of Appeals sustained the conviction for contempt of another absconding *Dennis* defendant upon evidence substantially the same as that in the present cases.[22]

Hall, like petitioners, was notified by his counsel on June 29, 1951 that his presence was required in court on July 2, absconded prior to that date, and was not shown to have had knowledge of the entry of the order requiring his surrender. The majority opinion seems to rest on alternative theories of guilt. First, the opinion holds (at 730) that Hall was guilty of disobeying a "command" of the court, of which he had notice, to appear before it on July 2. Second, *(ibid.)* it finds that counsel's notification of June 29 constituted constructive notice to Hall of the order thereafter entered on July 2 requiring him to surrender for commitment.[23] The difficulty with the first alternative is that

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[22] Hall, however, did not surrender voluntarily but was apprehended.

[23] Thus, after finding that Hall had notice of the order of July 2 and wilfully disobeyed it, the opinion states (at 730, ftn. 7): "That this was a notice to appear for the order of commitment, rather than the order itself, raises no question; the notice, too, formed part of the court's command."

Hall, like petitioners, was charged with and convicted of disobeying the order of July 2 and not of any prior "command" of the court, if one had in fact been given. The difficulty with the second alternative is that it sustains a conviction for knowing disobedience of an order without evidence that the accused had knowledge that the order was in fact entered.

Both of these errors are discussed at length in the dissenting opinion of Judge Biggs (at 733-35) who concludes his opinion with the statement (at 735) that, "A question of great public policy is here involved, however. The constitutional question aside, can it be said that Congress in enacting Section 401, Title 18, U. S. C. intended its provisions to have the United States Courts base convictions for criminal contempt on orders not yet entered? When the statute speaks of an 'order,' the reasonable conclusion is that it means an order *in esse*."

The "question of great public policy" which arose in the *Hall* case is again presented here and should be reviewed by this Court.

3. The courts below were without power to punish as criminal contempts petitioners' disobedience of the order requiring them to surrender for commitment.

It is petitioners' position that disobedience of an order requiring a convicted defendant to surrender for commitment was not a contempt at common law or under section 7 of the Judiciary Act of 1789, and is therefore not punishable as such under 18 U. S. C. 401.

At common law, a defendant who absconded in violation of an order requiring his appearance was not punishable for contempt. Instead, he was subject to outlawry upon becoming *quinto exactus*, that is upon failing to appear after his presence had been demanded in five successive

county courts. If he surrendered before the *quinto exactus* he received no punishment at all. 4 Blackstone, *Commentaries* (N. Y., 1854), 283; 2 Hale, *Pleas of the Crown* (Dublin, 1778), 224; 1 Pollock and Maitland, *The History of English Law* (2d Ed., 1898), 539.

Section 7 of the Judiciary Act of 1789 empowered the courts to punish "all contempts of authority in any cause or hearing before the same." Since the statute did not otherwise define "contempts," the term embraced only those offenses which were punishable as contempts at common law. See *United States* v. *Palmer*, 3 Wheat. 610, 630; *Jerome* v. *United States*, 318 U. S. 101, 108, fn. 6. Inasmuch as absconding was not a contempt at common law, it was therefore not punishable as such under the Judiciary Act.

Literally read, 18 U. S. C. 401 would seem to authorize the courts to punish disobedience of any lawful order (including an order for the surrender of a defendant) as a contempt, and in this respect to enlarge the contempt power as it existed under the original Judiciary Act. But such a reading ignores the language and purpose of the antecedent statute from which 18 U. S. C. 401 was derived. Section 401 (like its predecessor, 280 U. S. C. (1940 ed.) 385) represents a codification of the Act of March 2, 1831, 4 Stat. 487.[24] The latter recited that it was "declaratory of the law concerning contempts of court," and provided that:

> "* * * the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, shall not be construed to extend to any cases except * * * the disobedience or resistance by * * * any other person or persons, to any lawful writ, process, orders rule, decree, or command of said courts."

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[24] See 18 U. S. C. A. 401, Reviser's Note, and *Nye* v. *United States*, 313 U. S. 33, 45.

This wording makes it clear that the statute did not extend the contempt power to conduct which was not punishable as a contempt under section 7 of the Judiciary Act. On the contrary, both the language and legislative history of the statute show that it was intended as "a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789." *Nye v. United States*, 313 U. S. 33, 45. It follows that since disobedience of an order requiring the surrender of a defendant was not a contempt under the Act of 1789, it did not become punishable as such under the Act of 1831, either in its original form or in the codification which now appears in 18 U. S. C. 401. (See *supra*, p. 9.)

Research has disclosed no case prior to *United States v. Hall*, *supra*, in which a fugitive was prosecuted for contempt in a federal court.[*] The fact that there was no assertion of the contempt power in such a case for 162 years after the Act of 1789 and 120 years after the Act of 1831 substantiates our contention that the power is non-existent. See Frankfurter, *Some Reflections on the Reading of Statutes* (1947), p. 26.

The court in the *Hall* case acknowledged (at 727) that the common law did not consider a defendant who violates an order for his surrender in contempt. Nevertheless, it sustained the conviction on the ground that 18 U. S. C. 401, on its face, appears to include any lawful order and makes no exception for orders requiring surrender. The court reached this conclusion without considering the effect of the Act of 1789 or the language and purpose of the Act of 1831.

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[*] The dissent in the *Hall* case, *supra*, at 734 states: "Hall's counsel contends that in the whole course of our law as well as that of England there has been no proceeding like the one at bar. The view asserted may be an exaggerated one but exhaustive independent research has disclosed no similar case."

We submit that the decision in *Hall* was erroneous and, in any event, that the issue decided there and raised again here presents a novel and important question of statutory construction which should be reviewed by this Court.[26]

4. The trial court abused its discretion in sentencing petitioners to imprisonment for three years.

Except for *United States* v. *Hall* and *United States* v. *Thompson*, both *supra*, there has been no reported case of a contempt sentence in excess of two years (see *supra*, p. 10).[27] We believe that the three and four year sentences imposed on Hall and Thompson were excessive. In any event, the present cases are distinguishable on their facts. Hall and Thompson were apprehended, while petitioners surrendered and thus voluntarily submitted themselves to the authority of the court.

The court below held that since 18 U. S. C. 3146 fixes a maximum sentence of five years for the crime of bail jumping, a three year sentence is not excessive for the offense when prosecuted as a contempt (C. A. Op., *infra*, p. 31).[28] The court saw no reason to hold that "the maximum punishment for the same offence should depend upon the mode of trial" (C. A. Op., *infra*, p. 31). We believe that the

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[26] 18 U. S. C. 3146, making bail-jumping a crime, was passed after the decision in *Hall's* case. The saving clause of that section with reference to contempt (*supra*, p. 16; ftn. 20) obviously cannot establish that Congress intended to punish bail-jumping as a contempt under the Act of 1831 or 18 U. S. C. 401 (see *supra*, p. 14).

[27] In the remaining cases in which sentences of more than one year were affirmed, the sentences were as follows: a year and a day (two cases); a year and a month (one case); eighteen months (one case), and two years (two cases).

[28] The court also relied on the precedent of the *Hall* and *Thompson* cases (*ibid.*).

court was wrong. It is one thing to punish a man with a long penitentiary sentence which has been authorized by Congress upon conviction after indictment and trial by jury. It is quite another to impose the same sentence upon a summary conviction for contempt, even assuming that such a sentence is within the power of the court. In the latter case, the guiding principle should be exertion of "the least possible power to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231. The three year sentences imposed here, consecutive upon five year sentences under the Smith Act, violate that principle. For "the end proposed" was the vindication of the authority of the court, to which petitioners, albeit belatedly, had voluntarily submitted.

Review by this Court should therefore be granted to determine whether, if sentence of more than one year is authorized in contempt cases, the three year sentences imposed were not an abuse of the trial court's discretion.[29]

Conclusion

The petition for writs of certiorari should be granted.

Respectfully submitted,

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[29] This Court has power to reduce contempt sentences which it finds excessive. *United States v. United Mine Workers*, 330 U. S. 258, 304.

APPENDIX A

Opinions Below

1. Opinion of Court of Appeals.

Before:

HAND, HINCKS and WATERMAN,

Circuit Judges.

Appeals from judgments of the District Court for the Southern District of New York (Dawson, *J.*, presiding), sentencing the appellants to three years imprisonment for criminal contempt.

HAND, *Circuit Judge*:

The appellants, Green and Winston, appeal from sentences of three years imprisonment under the following circumstances. Each was one of a number of defendants convicted of a violation of § 2385 of Title 18, U. S. C., commonly known as the "Smith Act," after a long trial which ended on October 14, 1949; we affirmed the judgment on August 1, 1950, and the Supreme Court did the same on June 4, 1951. On the mandate of the Supreme Court's affirmance an order issued out of the District Court, directing all the defendants to appear for surrender to the marshal on July 2, 1951, and on June 28 it was served upon the attorney for the appellants who had both been released on bail pending the appeals. They did not appear on the return day, and successfully evaded arrest until they eventually surrendered, Green in February 1956 and Winston in March. These proceedings to punish them for disobedience of the order of June 28, 1951, were begun against

them before Judge Dawson, who after a hearing without a jury on March 26, 1956, sentenced each to a term of three years, cumulatively upon the original sentence of five years. Upon these appeals, which involve the same questions and may be decided together, three questions arise: (1) Whether the District Court has power to impose any sentence of more than one year for disobedience of its orders; (2) whether it had any power whatever to sentence these particular appellants for failure to surrender in response to the order of June 28, 1951; and (3) whether there was evidence enough to fix them with notice of that order before their surrender. Believing that our decisions in *United States* v. *Hall*, 198 F. 2d 726 and *United States* v. *Thompson*, 214 F. 2d 545, foreclose our consideration of the second and third questions, the appellants do not press them here, explicitly reserving, nevertheless, the right to do so should the cases come before the Supreme Court. Although in these two decisions we affirmed sentences of three and four years, we will assume, *arguendo*, that the first point, unlike the second and third, remains open.

The following is the first of the appellants' two arguments in support of the position that the sentences for more than one year were invalid. The Supreme Court definitively held in *Ex parte Wilson*, 114 U. S. 417, 429, that "a crime punishable by imprisonment for a term of years at hard labor is an infamous crime"; and it is no longer necessary that the feature of "hard labor" be added, if the confinement may be in a penitentiary. *Mackin* v. *United States*, 117 U. S. 348, 352; *In re Claasen*, 140 U. S. 200, 205. The punishment for any crime punishable by a sentence of more than a year, may be by confinement in a penitentiary (§ 4083, Title 18, U. S. C.); and it follows that a sentence for disobedience of a court order may not be for more than a year, for in that event it is an "infamous crime," and

must be prosecuted by indictment under the Fifth Amendment.

Concededly, this argument depends upon whether such disobedience is a "crime" within the meaning of the Fifth Amendment. In a civil action ordinarily the proceeding is only remedial and imprisonment is imposed only to coerce compliance; but it may also be punitive, provided its penal character be clearly enough disclosed from the outset.* Moreover, that is true *a fortiori* when the order, as here, issues as a step ancillary to a criminal prosecution. *Gompers v. United States*, 233 U. S. 604, 610, was a civil action in which the imprisonment for disobedience was purely punitive, and Holmes, J., speaking for the court used the following language:

> "It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, . . . and that at least in England it seems that they still may be and preferably are tried in that way."

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* *United States v. Rapp* (C. A. 2, February 4, 1957).

** *In re Kahn*, 204 F. 581 (C. A. 2); *In re Guzzardi*, 74 F. 2d 671 (C. A. 2); *McCain v. New York Stock Exchange*, 80 F. 2d 211 (C. A. 3).

Appendix A

Nevertheless, in spite of this statement there has been much confusion in the language used by the courts to describe criminal contempts; for certainty they have not consistently been called "crimes." Apparently by reason of faulty history, it became the prevailing belief about the end of the 18th Century that disobedience of court orders might be treated summarily without a jury, which would not have been possible had the Sixth Amendment applied to it. In any event so much has become well settled;* and the resulting confusion was enough to provoke Chief Justice Vinson, then speaking for the Court of Appeals of the District of Columbia, to say: "we see no advantage in rehashing the discussions on whether criminal contempt is sui generis," [which had been a favorite evasion] "offense, crime or felony. Criminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes, and some of it is not."*

Nevertheless, confused as the thinking no doubt has been, one thing seems certain: it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be begun by an indictment, and yet that it need not be tried to a jury. It would be even more unwarranted to make the right to a jury depend upon whether the imprisonment is more than a year; for the Sixth Amendment covers all "criminal prosecutions," except those for "petty offenses."** Perhaps all the decisions have been wrong that have held that disobedience may be so tried; but, if so, we may not overrule them; and indeed, when Congress in 1954 enacted § 3146 of Title 18

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* *Eisenbeckerv. Plymouth County*, 134 U. S. 31, 38; *In re Debs*, 158 U. S. 564, 596; *Myers v. United States*, 264 U. S. 95, 103; *United States v. United Mine Workers*, 330 U. S. 258, 296.

* *Warring v. Huff*, 122 F. 2d 641.

** Section 1(3), Title 18, U. S. C.

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it expressly declared: "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." That was a recognition of the power as it had then developed.

The appellants' second point is that in any event § 24 of the Clayton Act limited the permissible imprisonment for criminal contempts to a year. This argument runs as follows. Before 1914 there was no recorded decision of any sentence of more than a year for a criminal contempt, though there had been extremely large fines. That section was one of three—21, 22 and 24—the first two of which provided for the trial for disobedience of orders or judgments when "the act or thing" was a "criminal offense under any statute of the United States, or under the laws of any State in which the act was committed." The trial must then be to a jury. Section 24 provided that although §§ 21 and 22 should apply "to such contempts," "all other cases of contempt . . . may be punished in conformity to the usages at law and in equity now prevailing." This remained unchanged until the Act of 1948, when this passage, then a part of the last paragraph of § 402, Title 18, was changed to read: "may be punished in conformity to the prevailing usages at law." Although there had been decisions between 1914 and 1948 (this argument continues), in which courts had affirmed sentences longer than one year, these were mistakes, because § 24 by incorporating into the statute the usages then "prevailing," forbad longer sentences. Moreover, the change in 1948 from "usages at law and in equity now prevailing" to "prevailing usages at law" is not to be understood to indicate any change in the scope of the statute, for it was the declared purpose of the Revisers not to change its "meaning or substance."

This reasoning also does not convince us. There is no reason to suppose, because courts had not up to 1914 im-

posed imprisonment for more than a year, that they th
they had not the power to do so. There would have
no basis for such a conclusion except the constitu
argument that we have just held invalid, and there
in the books a syllable of recognition of any such sup
limitation. The "usages now prevailing" meant pra
that the courts for one reason or another thought co
ing, not limitations that, so far as appear, they th
the particular occasion demanded on the merits. Th
guage of § 401 has always been in substance as it
now: a "court of the United States shall have pow
punish by fine or imprisonment, at its discretion, such
tempt of its authority," etc. The phrase "at its discret
does not mean that the court must choose between fin
imprisonment; the word "or," itself provides as muc
the words, if so construed, would have been redu
The term of imprisonment is to be as much in the c
discretion as the fine. Besides, whatever may have
the longest sentence up to 1914, certainly during th
suing period of 34 years up to 1948, in at least fo
stances sentences of more than a year were affirmed f
very reason that the length of imprisonment was
determined at the court's "discretion." * The sa
true of four decisions of courts of appeals after 19
of which, like the four earlier ones, declared, though
and without discussion, that the court's discretion ha
been abused." **

Thus there has been an unbroken line of authorit
trary to the proposition that § 24 put a year's limit

* *Cockmore v. United States*, 237 F. 743 (C. C. A. 8);
v. United States, 59 F. 2d 929 (C. A. 8); *Warren v. Hu*
122 F. 2d 641 (C. A. D. C.); *United States v. Lederer*, 14
136, 139 (C. A. 7).

** *United States v. Hall*, *supra*; *United States v. Tho*
supra; *Nilva v. United States*, 227 F. 2d 74 (C. A. 8); *Lop*
United States, 216 F. 2d 87 (C. A. 8).

imprisonment. Moreover, by the Act of 1954, of which we have spoken, it provided that a person who was admitted to bail, and who failed to appear, became subject to imprisonment for not more than five years, when tried by a jury, if the charge on which he was tried was a felony, but for only one year, if the charge was a misdemeanor. Therefore, if the court's summary power is limited to one year's imprisonment in the case of felonies, the result is that, when the defendant is charged with a felony and "jumps bail," he may be imprisoned only five times as long if he is tried to a jury as he can be if he is tried to a judge; but when he is charged with a misdemeanor, it makes no difference whether he is tried to judge or jury. It is hard enough to see why the maximum punishment for the same offence should depend upon the mode of trial; but it is impossible to suppose that so great a disparity should have been intended when the offender was charged with "jumping bail" in a prosecution for felony, but that no disparity whatever should have been intended when he did the same in a prosecution for a misdemeanor. Moreover, the Senate Report (U. S. Code Congressional and Administrative News, 1954, Vol. II, p. 3074) dictates that the "proposed legislation seeks to create a statutory deterrent which will minimize the possibility of bail forfeiture"; and it is extremely unlikely that so great an increase as five-to-one would not have been mentioned, if it had been supposed that the existing maximum in felonies was only a year.

Finally, in view of this statute, especially directed as it is against this particular kind of disobedience, we cannot hold that three years was an abuse of discretion, when we remember that in *United States* v. *Hall*, *supra* (128 F. 2d 726) and *United States* v. *Thompson*, *supra* (214 F. 2d 545), we sustained as long, or longer, sentences.

We do not see that either Criminal Rule Seven or Rule Forty-two, needs any discussion, if what we have said is true.

Judgments affirmed.

2. Opinion of District Court in the *Green* Case.

Dawson, *D. J.*

This proceeding was brought on by an order to show cause duly served upon the respondent, directing him to show cause why he should not be adjudged and held in criminal contempt of this Court by reason of the fact that he knowingly and deliberately disobeyed and resisted a lawful order and command of this Court directing him to appear before it on July 2, 1951 and July 3, 1951 for surrender for execution of the judgment and sentence imposed under an indictment C 128-87.

Respondent was convicted in this Court, after a long trial before Judge Medina, of conspiring to teach and advocate the overthrow of the government by force and violence, 18 U. S. C. A. 2385, and pending appeal from his conviction was ordered released on bail. The conviction was sustained by the Court of Appeals, 183 F. 2d 201, and on June 4, 1951, the Supreme Court affirmed his conviction. *Dennis v. United States*, 341 U. S. 494. A proposed order on mandate requiring his appearance for surrender to the United States Marshal on July 2, 1951 was served upon his counsel on June 28, 1951. Respondent did not appear on July 2, 1951. And attempts thereafter to execute a bench warrant at his stated address failed.

Respondent was arraigned and pleaded not guilty to the charge of contempt, and the issues were tried by the Court without a jury pursuant to Federal Rules of Criminal Procedure, Rule 42.

The evidence showed that the order of Judge Ryan of July 2, 1951 required the respondent to surrender personally to the United States Marshal for the Southern District of New York. There is no doubt that respondent did not surrender for over four years, or not until February 27, 1956 when he surrendered himself for commitment at the United States Courthouse in New York, N. Y.

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The evidence was sufficient to establish, beyond a reasonable doubt, that the respondent knowingly disobeyed the order of Judge Ryan. The evidence showed that Mr. Seidler, an attorney in the case, personally advised the respondent on June 26th that he had to be in Court on July 2, 1951. There was other evidence that thereafter, but before July 2, respondent left his New York City address and was not seen there again. There was further evidence that several days before respondent surrendered, he issued a written statement to the press admittedly signed by him which conclusively established that he had remained in hiding in order to avoid serving the sentence to which he had been committed. Furthermore, on the day on which he surrendered, respondent made statements to the reporters who were present on the Courthouse steps which also conclusively established that he had knowingly and wilfully absented himself so as to avoid serving a sentence which he knew had been imposed upon him.

From the testimony, the Court found as a fact that respondent had notice of the order and wilfully disobeyed it. *See United States v. Cue Hall*, 198 F. 2d 726 (C. A. 2, 1952), cert. den. 345 U. S. 905 (1953).

Respondent then contended that the Court was without power to impose a sentence of contempt of Court of more than one year, and this opinion deals primarily with that question.

401 of 18 U. S. C. provides that

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as

> • • •

> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

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It is the argument of the respondent that this provision is not a grant of unlimited power to the Court, but that the discretion of the Court is confined to punishment for a misdemeanor, as defined in Act Tit. 18 U. S. C., i.e., a crime punishable by imprisonment for not more than one year. Respondent argues that at Common Law, contempt was considered to be a misdemeanor; and that if § 401 is construed to authorize the punishment of contempt by a term of more than one year, it would violate that provision of the Fifth Amendment to the United States Constitution which provides that:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

This argument presupposes that criminal contempt is an "infamous crime" within the meaning of those words as used in the Fifth Amendment.

While, for certain purposes, contempt cases may be considered criminal cases, it has been well established that "proceedings in contempt may be said to be sui generis". *O'Neal v. United States*, 190 U. S. 36 (1903).* The Court of Appeals for the Eighth Circuit in a case which raised the point now urged by the respondent decided that a criminal contempt is an "offense" and that the sentence imposed might exceed a year in the penitentiary. *Cruickshank v. United States*, 237 F. 743 (1916).

The argument that the English courts at the time of the adoption of the original Judiciary Act of 1789 considered criminal contempts as misdemeanors is not persuasive. In those days, many crimes which were considered misdemeanors were punished by sentences much more severe than one

* See to same effect *Boudoin v. Boudoin*, 278 S. W. 2d 670 (Sup. Ct. Tenn. 1955).

year in the penitentiary. In fact, in those days, the fact that a crime was a felony implied in law that it was punishable by capital punishment even if the statute prescribed no penalty." Blackstone, *Commentaries on the Laws of England* (1765-9) Vol. IV, p. 98. Consequently, characterization of an offense as a misdemeanor meant merely that it was not punishable by capital punishment and not, as respondent contends, that it was punishable by imprisonment of no more than one year. Blackstone, with reference to the punishment for contempt, states as follows:

> "If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or *ignominous* punishment." Vol. IV, p. 287 (emphasis added).

The respondent argues that by virtue of the Common Law, a criminal contempt is a misdemeanor and hence is not punishable by a sentence of more than one year under 18 U. S. C. A. This argument involves a misapprehension of 18 U. S. C. A. This section does not state that if a crime is a misdemeanor it may not be punished by a sentence of in excess of one year. Rather, the section provides the reverse, that if the allowable punishment is one year or less, the crime is a misdemeanor. Thus, it is the penalty which governs the classification and not any characterization or classification given by the Common Law or by a statute which governs the penalty. *Ex parte Bride*, 279 F. 147, 149 (E. D. N. Y. 1922), aff'd 263 U. S. 4 (1923).

The point urged by respondent depends not so much upon the penalty which might be imposed but rather upon the question as to whether contempt was at the time of the framing of the Constitution considered as that type of "infamous crime" which at Common Law was triable by a jury.

While it has been said by distinguished authors that up to 1720, cases of contempt in England, when committed not

in the presence of the Court or by persons officially connected with the Court, were tried by a jury, there is no indication that this procedure was followed after 1720.*

Blackstone, whose *Commentaries* probably did much to influence the thinking of American lawyers at and before the time of the framing of the Federal Constitution, pointed out that:

> "A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal" (Vol. IV, p. 286).

That contempts, insofar as punishment is concerned, were sui generis and were not "infamous crimes" within the meaning of the Fifth Amendment has been recognized over the past century and a half. As early as 1812, the Supreme Court of the United States pointed out that "the United States Courts had no Common Law jurisdiction in criminal cases, and that their jurisdiction must, in each case, depend upon a statute, except that the power to fine or imprison for contempt is a power which necessarily resides in the courts of justice from the nature of their institution and does not depend upon statute. *The United States v. Hudson and Goodwin*, VII Cranch 32 (1812). In 1811, the Court for the Trial of Impeachments and the Correction of Errors of the State of New York held:

> "A contempt is an offense against the court, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same be punishable as a crime or misdemeanor, on indic-

* "*Power of Congress over Procedure in Criminal Contempts*" Frankfurter and Landis, 37 Harv. L. Rev. 1010 at 1042 (1924).

ment, or not." *Yates v. Lansing*, 9 Johns. 395, 413 (1811).

Cooley in *Constitutional Limitations* (8th Ed. 1927), p. 668, Note 2, states:

> "The power to punish contempts summarily is incident to courts of record, and the courts have generally held that cases of contempt are not triable by jury. The objects of the power would be defeated in many cases if they were."

The power to punish for contempt is not controlled by the Constitution as to modes of accusation and methods of trial. *In re Michaels*, 146 F. 2d 627 (C. A. 3, 1944), rev'd on other grounds, 326 U. S. 224 (1945). A Court in enforcing obedience to its orders by proceedings for contempt "is not executing the criminal laws of the land" nor in such a proceeding is there "any invasion of the constitutional right of trial by jury." *In re Debs*, 158 U. S. 564, 594, 596 (1895); see *United States v. United Mine Workers*, 330 U. S. 258 at p. 298 (1947).

Whether the right of trial by jury for criminal contempt should be granted by appropriate amendment to the statute or rule is a matter which appropriately may be argued. "*Contempt of Court, Criminal and Civil*", Joseph H. Beale, Jr., 21 Harv. L. Rev. 161 (1908); "*Civil and Criminal Contempt in the Federal Courts*," 57 Yale L. Journal 83 (1947).

However, no such argument was made by the respondent. He limited his argument solely to the extent of the sentence. Such sentence, it has been established, rests solely in the sound discretion of the Court, subject only to the Constitutional provision against cruel and unusual punishment. *United States v. Ledcor*, 140 F. 2d 136 (C. A. 7, 1944). Thus, in *Hill v. United States ex rel. Weiner*, 300 U. S. 105 (1937) a two-year sentence was affirmed; in *Cun-*

ley v. *United States*, 59 F. 2d 929 (C. A. 8, 1932), a two-year sentence was affirmed; in *United States* v. *Ball*, 198 F. 2d 726 (C. A. 2, 1952), cert. den. 345 U. S. 905, a three-year sentence was affirmed; in *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2, 1954), a four-year sentence was affirmed.

In the exercise of the discretion residing in the Court, the respondent has been sentenced to three years in the penitentiary following the completion of the five year sentence which was originally imposed upon him.

Dated: New York, N. Y., April 16, 1956.

s/ ARCHIE O. DAWSON,
U. S. D. J.

APPENDIX B

Statutes Involved

18 U. S. C. 401, 62 Stat. 701, provides in part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> • • •
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402, 63 Stat. 90, provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1000, nor shall such imprisonment exceed the term of six months.

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This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed by disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 7 (a) of the Federal Rules of Criminal Procedure provides:

Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

APPENDIX C

Digest of State Statutes Specifying Punishment for Criminal Contempt

State	*Maximum Penalty*	*Reference*
Ala.	$100 and 10 days	13 Code 9.
Ariz.	If the act is also a criminal offense, $1,000 and 6 months; otherwise, "in conformity to practice and usage of the common law."	27 Code 601, 04
Ark.	$50 and 10 days	34 Stats. 902
Calif.	$500 and 5 days	Code Civ. Proc. 1218
Colo.	No provision	
Conn.	$100 and 6 months	Gen'l Stats., 7702, 8820
Del.	No provision	
Fla.	No provision	
Ga.	$500 and 20 days	24 Code 2613, 2801
Ida.	$500 and 5 days	Code, 7 610
Ill.	No provision	
Ind.	$500 and 3 months	5 Stat. 900
Ia.	$1,000 and 6 months	665 Code 4
Kan.	No provision	
Ky.	$20 and 30 hours where no jury	132 R. S. 260
La.	$100 and 10 days	15 R. S. 12
Me.	No provision	
Md.	No provision	
Mass.	Misdemeanor; commitment to common jail only.	274 Laws 1; 220 Laws 14

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State	*Maximum Penalty*	*Reference*
Mich.	$250 and 30 days	4 Comp. Laws 29
Minn.	$250 and 6 months	1888 Stats. 107
Miss.	$100 and 30 days	2 Code 1050
Mo.	Misdemeanor; $1,000 and 1 year.	R. S. 1919 120, 5360 040, 5360 060
Mont.	Misdemeanor; $500 and 6 months	94 Code 110, 3540
Neb.	No provision	
Nev.	$500 and 25 days	Laws, 8660
N. H.	No provision	
N. J.	No provision	
N. M.	"Usage of the courts of the United States."	39 Stats. 1 2
N. Y.	Misdemeanor; $250 and 30 days	Penal Law, 600; Judiciary Law, 751
N. C.	$250 and 30 days	5 Gen. Stats. 4
N. D.	$250 and 30 days	27 Code 1002
Ohio	$500 and 10 days	Code, 12142
Okla.	Fine and imprisonment at discretion of the court	21 Stats. 566
Ore.	$300 and 6 months	R. S. 33.020
Pa.	Fine only when contempt not committed in open court	17 Stats. 2042
R. I.	Fine or imprisonment or both	Chap. 500 Gen'l Laws, Sec. 30 s 1928 1
S. C.	Imprisonment in penitentiary prohibited	Constit., Art. I, Sec. 19
S. D.	Misdemeanor; $500 and 1 year.	Code, 13.0607, 13.1205
Tenn.	$50 and 10 days	Code, 10120

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State	*Maximum Penalty*	*Reference*
Tex.	$100 and 3 days	Stats., 1911
Utah	$200 and 30 days	4 Code 32 10
Vt.	Misdemeanor	Stats. 1274, 8615, 9960
Va.	No provision	
Wash.	$500 and 6 months	R. Code, 7 20 020
W. Va.	No provision	
Wisc.	Fine and 6 months	226 Stats. 125
Wyo.	No provision	

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In the Supreme Court of the United States

OCTOBER TERM, 1956

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

WILLIAM F. TOMPKINS,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 897

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 25-31) has not yet been reported. The opinion of the District Court in the *Green* case (Pet. 32-38) appears at 140 F. Supp. 117.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1957. On February 21, 1957, an order was entered by Mr. Justice Harlan extending the time for filing a petition for certiorari to April 12, 1957. The petition was filed on April 9, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the trial court had the power to sentence petitioners to terms in excess of one year for criminal contempt.

2. Whether the evidence was sufficient to sustain the findings that petitioners knowingly disobeyed an order of the District Court.

3. Whether petitioners' disobedience of the order of the District Court, which required them to surrender from enlargement on bail after affirmance of their convictions, constituted contempt.

4. Whether the trial court abused its discretion in sentencing petitioners to imprisonment for three years where petitioners had flouted the order of the District Court for a period of nearly five years.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States, insofar as relied upon, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

Amendment VI provides

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

18 U. S. C. § 401:

> A court of the United States shall have power

to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 701.)

18 U. S. C. § 402:

* * * * *

This section shall not be construed to relate to contempts * * * committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 701; May 24, 1949, ch. 139, Sec. 8 (c), 63 Stat. 90.)

Rule 7, Federal Rules of Criminal Procedure:

(a) * * * An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or, if indictment is waived, it may be prosecuted by information. * * *

Rule 42, Federal Rules of Criminal Procedure:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was commited in the actual presence of the court. * * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in sub-

division (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides.

* * *

STATEMENT

These proceedings were initiated in the District Court for the Southern District of New York, upon application of the United States Attorney, by an order requiring petitioners to show cause why they should not be adjudged guilty of contempt of the court for disobedience of and resistance to an order of that court. 18 U. S. C. 401 (3) (*supra*, pp. 2-3); Rule 42, Federal Rules of Criminal Procedure (*supra*, pp. 3-4). Prior to trial, petitioners were served with "Specifications of Criminal Contempt." Trial was had on March 12 and March 26, 1956, before Judge Dawson, who found the petitioners guilty and sentenced each to a term of three years (G. Tr. 87; W. Tr. 64).[1] On appeal, in a unanimous opinion by Judge

[1] "G. Tr." and "W. Tr." refer to the typewritten transcript from the court below in the *Green* case and the *Winston* case, respectively. Neither record has been printed. "G. Ex." designates an exhibit in the *Green* case and "W. Ex." an exhibit in the *Winston* case.

Hand, the judgments of conviction were affirmed by the Court of Appeals for the Second Circuit.

The pertinent facts are as follows:

In 1949, petitioners, together with nine other defendants, were convicted in the District Court of violation of Sections 2 and 3 of the Smith Act (18 U. S. C. 2385) and were each sentenced to five years imprisonment and a fine of $10,000. (G. Tr. 98; W. Tr. 69). Pending appeal, petitioners were enlarged on bail bond. The recognizance under which they had been released was conditioned *inter alia* upon their surrender "in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct, if the judgment and sentence appealed from shall be affirmed" (G. Tr. 11; W. Tr. 13-14). Petitioners' convictions were affirmed by this Court, after affirmance by the Second Circuit, on June 4, 1951. *Dennis* v. *United States*, 341 U. S. 494.

On June 28, 1951, Mr. Harry Sacher, on behalf of petitioners, accepted service of a proposed order on mandate, requiring petitioners personally to surrender on July 2, 1951 to the United States Marshal for execution of their sentences, together with notice that such order would be presented for settlement and signature on Monday, July 2, 1951, at 10:00 a. m. (G. Tr. 12; G. Ex. 5; W. Tr. 14-15; W. Ex. 1).

On the following day, June 29, 1951, Mr. Sacher, on behalf of petitioners and the other *Dennis* defendants, asked the United States Attorney to postpone

the surrender until after July 4, 1951, "to allow these men to spend the last holiday, which would be available to them for some years * * * with their wives and children * * *" (G. Tr. 18). This request was denied. Later that afternoon, Mr. Sacher appeared before Judge Ryan in connection with his motion relating to suspension or staying of the sentences imposed on all of the defendants in the *Dennis* case. All motions were continued until Monday, July 2, 1951, Mr. Sacher stating to the court: "You have my word that all of these defendants will be here at that time." When questioned by Judge Ryan (on July 3) concerning this statement, Mr. Sacher agreed that it had reference to the eleven defendants, including petitioners (G. Tr. 14; W. Tr. 17), and stated: "[T]he only basis on which I could make my statement or promise to the Court was the promise of my clients and the others to appear" (G. Tr. 17; W. Tr. 19).

After the District Court proceedings on June 29, 1951, Mr. Sacher went to Communist Party Headquarters, 35 East 12th Street, where he met with the *Dennis* defendants (G. Tr. 15; W. Tr. 18), and notified them that they would have to appear in court on Monday, July 2. Respecting this meeting, Mr. Sacher informed the court as follows (G. Tr. 15-16; W. Tr. 18-19):

> The COURT. Did you tell them at that time that their presence was required in court yesterday morning?
>
> Mr. SACHER. Definitely, * * * after I had been here on Friday, your Honor, and had made

these motions, [I] advised that they all should be present, and I was assured they would be.

The COURT. By them?

Mr. SACHER. Yes, by all of the defendants.

The COURT. That is, that all defendants would be here?

Mr. SACHER. That's right.

Petitioners did not appear on July 2, at which time the proposed order on mandate, requiring their surrender to the United States Marshal, was signed by Judge Ryan (G. Tr. 12; W. Tr. 14). Attempts thereafter to execute a bench warrant for petitioners were without success (G. Tr. 20-21; W. Tr. 25-27). Petitioner Green did not surrender until February 27, 1956, and Winston not until March 5, 1956 (G. Tr. 22; W. Tr. 25).

These proceedings were then instituted against petitioners charging each with knowingly and deliberately disobeying and resisting the July 2, 1951 order requiring their surrender (G. Tr. 88-93, 98-108; W. Tr. 65-79). In finding each petitioner guilty, the court concluded that the evidence was sufficient to establish that petitioner deliberately and knowingly disobeyed the order requiring his surrender (G. Tr. 44-45; W. Tr. 39).

ARGUMENT

The issues here raised by petitioners Green and Winston regarding the scope of the contempt power and the sufficiency of the evidence are substantially the same as those advanced by petitioners' co-fugitives Gus Hall in *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), in which this Court declined review,

345 U. S. 905, and Robert Thompson in *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), in which this Court also declined review, 348 U. S. 841.[1] In addition, petitioners claim that the trial court was without power to sentence them to terms in excess of one year.

All of these cases involve convictions for contempt for a wilful failure to obey the same order of Judge Ryan to appear for surrender on July 2, 1951, following this Court's affirmance of the four defendants' (Hall, Thompson, Green, and Winston) Smith Act convictions in *Dennis* v. *United States*, 341 U. S. 494. The facts relating to each, while not identical, follow the same general pattern. It is submitted that there is no more warrant for review in this case than existed in the *Hall* and *Thompson* cases.

1. Petitioners maintain that the District Court exceeded its power in imposing a sentence of more than one year for contempt. This contention is at odds, not only with the plain wording of 18 U. S. C. 401, but also with long-standing authority.

Section 401 of 18 U. S. C. provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *

[1] In fact, in the court below, petitioners limited their brief and argument to the question of the validity of the three-year sentences, conceding that the decisions in *Hall* and *Thompson* foreclosed that court's consideration of petitioners' other contentions (Pet. 5, 26).

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

In terms, therefore, the statute in no way limits the length of sentence which may be imposed upon a contemnor. Indeed, the very reverse of such a limitation is suggested by the phrase "at its discretion." This phrase, as Judge Hand pointed out in the opinion below (Pet. 30), means that "The term of imprisonment is to be as much in the court's discretion as the fine." Such discretion, of course, cannot be exercised arbitrarily. See *United States* v. *Mine Workers*, 330 U. S. 258. But, apart from that exception, it is for the trial court to determine the proper punishment for criminal contempts.

At least four decisions by courts of appeals are in accord; there is no decision to the contrary. In *Warring* v. *Huff*, 122 F. 2d 641, 642 (C. A. D. C.), certiorari denied, 314 U. S. 678, the court held that "the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge." Likewise, in *United States* v. *Lederer*, 140 F. 2d 136, 139 (C. A. 7), certiorari denied, 322 U. S. 734, the court ruled that punishment in a contempt proceeding "rests solely in the sound discretion of the court, subject only to the Constitutional provision against cruel and unusual punishment." In both the *Warring* and *Lederer* cases, the sentence also exceeded one year.

In *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646, the court rejected the very argument now being urged by petitioners. In upholding a sentence of a year and a day

and ruling that a statute almost identical to Section 401 "vest[ed] almost unlimited discretion in the court as to the character and extent of punishment" (p. 748), the court remarked that "* * * we must either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the court in some mysterious way means that the discretion is limited to one year, without that thought being expressed." 237 Fed. at 754. See also *Conley* v. *United States*, 59 F. 2d 929, 936 (C. A. 8) (sentence of two years) ("The extent of the punishment, when not grossly excessive, lies within the discretion of the court").

There are numerous other cases in which sentences of more than a year were imposed. *E. g.: Hill* v. *United States*, 300 U. S. 105 (sentence of two years); *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), certiorari denied, 345 U. S. 905 (sentence of three years); *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841 (sentence of four years); *Nilva* v. *United States*, 352 U. S. 385 (sentence of one year and one day); *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916 (sentence of eighteen months); *Yates* v. *United States*, 227 F. 2d 848 (C. A. 9) (sentence of three years); *United States* v. *Miranda*, Docket No. C 144-167 (S. D. N. Y.) (sentence of three years); *United States* v. *Pontillo*, Docket No. C 151-113 (S. D. N. Y. (sentence of four years).

In an attempt to impose a one-year limitation on Section 401, petitioners place principal reliance on

Section 24 of the Clayton Anti-trust Act of 1914 (38 Stat. 739). Section 24 provided that contempts may be punished "in conformity to the usages at law and in equity now prevailing". Petitioners maintain that such usages preclude imposition of a sentence of more than one year. However, the statute governing petitioners' case is not Section 24 of the Clayton Act, but rather 18 U. S. C. 402, which replaced Section 24 when the latter was repealed on June 25, 1948. Section 402 states only that a contemnor may be punished "in conformity to the prevailing usages at law". It is evident from the cases that the "prevailing usages at law", regardless of what they may have been prior to 1914, as of 1948 were that a contemnor may be sentenced to more than one year's imprisonment. *Warring* v. *Huff*, *supra*; *United States* v. *Lederer*, *supra*; *Creekmore* v. *United States*, *supra*; *Conley* v. *United States*, *supra*; *Hill* v. *United States*, *supra*.

Nevertheless, even if the present case were governed by Section 24 of the Clayton Act, the "usages" prevailing in 1914 were such that a contempt could be punished by more than a year's imprisonment. It was decided in *Creekmore* v. *United States*, *supra*, less than two years after the passage of the Clayton Act, that a sentence for a year and a day was valid. The court, though it made no reference to the Clayton Act, must certainly have considered such a sentence within the "usages" prevailing in that era. Similarly, in *Hill* v. *United States*, *supra*, where Section 24 of the Clayton Act was directly involved and where the validity of a two-year sentence was at-

tacked as excessive, this Court unanimously sustained the sentence without any intimation that Section 24 imposes a one-year limitation. The short answer to petitioners' contention is that the "usages" clause of Section 24 and 18 U. S. C. 402—to the extent it has any bearing on the amount of punishment imposed for criminal contempts—does no more than adopt the well-established principle that "the maximum is the non-arbitrary discretion of the trial judge." *Wiering* v. *Huff*, *supra*.[5]

Petitioners seek to support their construction of the "usages" clause on the further ground that such a construction would avoid adjudication of a constitutional question—namely, whether criminal contempt, if punishable by imprisonment for more than a year, is an "infamous crime" within the meaning of the Fifth Amendment and hence must be prosecuted by indictment. This argument, however, ignores the historically unique status of criminal contempts. Contempts have never been classed as either "felonies" or "misdemeanors" in this country, but rather have always been regarded as *sui generis*.

[5] Petitioner's construction of the "usages" clause, it should be noted, is presumably applicable not only to the power to punish by imprisonment but also to the power to punish by fine. If so, and if such a construction were adopted, it would appear to follow that no fine for criminal contempt could exceed the maximum imposed on October 15, 1914. See, in this respect, *United States* v. *Mine Workers*, 330 U. S. 258, sustaining (as modified) an unprecedented fine of $700,000. None of the five opinions in that case, including the three dissents, gives any indication that the "usages" clause imposes a fixed limitation on punishment for criminal contempt.

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324, 326; *Warring* v. *Huff*, *supra*.[4]

A contemnor has never enjoyed the full bundle of constitutional rights ordinarily given to one charged with a "crime". More particularly; the constitutional strictures "as to modes of accusation and methods of trial" are not binding in contempt cases. *Ex parte Hudgings*, 249 U. S. 378, 383. This has been so; historically, because the courts have recognized that the power of summary punishment is essential for their self-preservation and so that they can "restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 419.

"While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offense have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Myers* v. *United States*, 264 U. S. 95, 104-105. Thus, the fact that one accused of contempt does not receive a trial by jury does not violate that provision of the Sixth Amendment requiring a jury trial in "all criminal prosecutions." *Interstate Commerce*

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[4] In the *Warring* case, Mr. Chief Justice (then Judge) Vinson stated aptly: "'. . . we see no advantage in rehashing the discussions on whether criminal contempt is sui generis, offense, crime, or felony. Criminal contempts are criminal contempts; some of the procedural and substantive law applied to criminal contempts is as though they were crimes, and some of it is not.'"

Commission v. *Brimson*, 154 U. S. 447, 489; *In re Debs*, 158 U. S. 564, 594-596. By the same token, and because of the same considerations, a contempt is not a "crime" within the meaning of the Fifth Amendment. "In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land * * *" (*id.* at 596), but rather is protecting the integrity of its processes and orders. "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency" (*id.* at 595). See also *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36; *Michaelson* v. *United States*, 266 U. S. 42, 65-67. This rationale is no less applicable to a grand jury than a petit jury. Yet, as Judge Hand points out in the opinion below (Pet. 28), the necessary consequence of adopting petitioner's view would be the anomaly that contempt proceedings, if the punishment may exceed a year's imprisonment, must be begun by a grand jury, although such proceedings need not be tried to a petit jury. The difficulties inherent in such a result—both logical and practical—demonstrate the lack of merit in the constitutional innovation suggested by petitioners.

Nor was the *sui generis* nature of contempt proceedings changed by the Federal Rules of Criminal Procedure. Petitioners rely heavily on Rule 7 of the Federal Rules of Criminal Procedure, which provides that an "offense" punishable by more than a year's imprisonment be prosecuted by indictment (Pet. 9). However, this Rule does not apply to contempts; for

Rule 42 specifically deals with contempts and the procedures to be followed with respect thereto. Rule 42 requires no indictment. When Rule 42 was adopted in 1944, there had been a long line of federal cases, not begun by indictment, imposing sentences of more than a year for contempt. No exception to Rule 42 was made to cover the more-than-one-year cases; that rule speaks broadly in its title of "Criminal Contempt." Had the drafters of Rule 42 intended to take the far-reaching step of either making criminal contempts subject to the requirement of an indictment or overruling a long line of cases, they would hardly have been so silent.

2. Petitioners argue that there is no evidence that they had knowledge of the existence of the order which they were convicted of disobeying (Pet. 17). As in *United States* v. *Hall*, 198 F. 2d (C. A. 2), certiorari denied, 345 U. S. 905, and *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841, the conclusion is inescapable that petitioners were fully aware of the order requiring them to appear for execution of their sentences and wilfully disobeyed it. Equally applicable here is Judge Clark's statement in *Hall* that this "inference not only was well within the area permitted to a trier of facts, but was indeed one highly reasonable if not compelled." 198 F. 2d at 730.

On Friday afternoon, June 29, 1951, Mr. Sacher went from the United States Courthouse to Communist Party Headquarters where petitioners and the other *Dennis* defendants, all national officers of the

Communist Party, were gathered and were advised by him that their presence in court was required on Monday, July 2, 1951, when the proposed order was to be signed (G. Tr. 15-16; W. Tr. 18-19). Petitioners had previously applied for a stay of mandate of this Court, which was due to come down on June 29 and, when this was denied (G. Tr. 12; W. Tr. 15; 117 F. Supp. 685), counsel, on their behalf, then asked for an adjournment of petitioners' surrender until after July 4, so that they could be with their families over the holiday (G. Tr. 18). In addition, there is evidence that petitioners, after receiving notice from their attorney to surrender for commitment, left their regular places of residence and remained in hiding for a period of almost five years (G. Tr. 21-22; W. Tr. 26-27). There was further evidence that, several days before petitioners surrendered, they issued written statements to the press admittedly signed by them which conclusively established that they had remained in hiding in order to avoid serving the sentence to which they had been committed (G. Tr. 9; W. Tr. 21-25).[5] In view of the totality of this evidence, and since petitioners' disappearances were coincidental with the surrender order, the trial court was amply justified in finding that petitioners' flights were prompted by their knowledge of the surrender order.

The Second Circuit in the *Hall* case held, on almost identical facts, that the inference found by the trial

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[5] Green made similar statements in an oral interview with the press when he presented himself at the Court House (G. Tr. 27-32).

court that Hall knew of the order was highly reasonable; that the burden of proof beyond a reasonable doubt "constitutes an over-all admonition or warning, rather than a precise yardstick to be applied to each isolable segment of proof. * * * There can be little doubt but that a jury would have been permitted to make the rational inference made [by the court] below. We think that a court must not be restricted beyond a jury or compelled to remain blind to so clearly intentional a 'flouting of its command as was here shown". (198 F. 2d at 731). So here, the elements of the Government's proof, when considered in context, reveal a similar pattern of conduct.

3. Petitioners argue that federal district courts do not possess the power to punish a defendant for criminal contempt for disobedience of an order requiring him to surrender for execution of a sentence imposed on him (Pet. 19). This is substantially the same argument as was made in the petitions for writs of certiorari in the *Hall* and *Thompson* cases.

Petitioners do not deny that, under the literal language of 18 U. S. C. 401 (specifying as contempt of court the "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command"), disobedience of any order, including an order for the surrender of a defendant for execution of sentence, would constitute contempt of court. Instead, they argue that, since outlawry was the punishment for absconding at common law, the contempt statute should not be interpreted as reaching disobedience of an order to surrender for commitment.

In their argument, petitioners, as did Hall and Thompson, overlook the fact that they all were convicted, not of "bail-jumping," but of wilful disobedience of the same specific order that each surrender himself from liberty on bail for execution of sentence. This is very different from the mere act of absconding while on bail. As held by the Second Circuit in *United States* v. *Hall*, 198 F. 2d 726, the offense of wilful disobedience clearly falls within the language of the statute, and there is no reason to carve an exception. Since the original theory of bail was that the prisoner was in the custody of his bail, rather than the sheriff, the act of absconding was escape from custody and obviously not violative of any specific court order. Cf. 2 Pollock and Maitland, *History of English Law* (1895 ed.), 580-584. For such an escape, his body was defaulted. Also recognized at common law was the penalty of outlawry, which might have been assessed against fugitives from justice, but which has long since fallen into obscurity. 3 Holdsworth, *History of English Law* (3d ed., 1923), 604-606.

Nevertheless, once a specific order to surrender has been properly entered and wilfully disobeyed, the case falls squarely within the plain language of 18 U. S. C. 401 (3). There is no reason why the statute should not be applied according to its terms. The order in this case to submit for execution of sentence is just as formal an order as an injunction order or a subpoena. Certainly a wilful disobedience of such an order is as much an affront to the dignity of the court as a wilful refusal to obey an injunc-

tion or appear pursuant to a subpoena. Petitioners state that prior to *Hall* there had never been a case in which a fugitive was prosecuted for contempt in a federal court. But where conduct clearly comes within the statutory definition of contempt, as in this case, it is immaterial that the contempt proceedings may be novel or unusual. See *State* v. *Albin*, 118 Ohio St. 527, 161 N. E. 792; *Silverman* v. *Seneca Realty Co.*, 154 Misc. 35, 276 N. Y. S. 466; *Dollard* v. *Koronsky*, 67 Misc. 90, 121 N. Y. S. 987, *affirmed*, 138 App. Div. 213, 123 N. Y. S. 11, *affirmed*, 199 N. Y. 558, 93 N. E. 1119. Cf. *Arizona Employers' Liability Cases*, 250 U. S. 400, 419.

Congress, in 1954, recognized the propriety of the use of the contempt power when the failure of one free on bail to surrender himself also involves contempt of court. In enacting a statute making bail-jumping a federal offense, Congress expressly provided that "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." 18 U. S. C. 3146.

4. Petitioners contend that the trial court abused its discretion in sentencing them to imprisonment for three years (Pet. 22).[*] In this respect, they attempt to draw a factual distinction between their situation and those of their co-fugitives Hall and Thompson. This attempted distinction is based on the fact that Hall and Thompson were apprehended

[*] This contention was not raised in the briefs in the court below. However, we understand that it did arise during oral argument.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 100

GILBERT GREEN AND HENRY WINSTON,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

JOHN J. ABT,
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New York 7, N. Y.
Attorney for Petitioners.

for certiorari was filed on April 9, 1957 and was granted on May 27, 1957. The Court has jurisdiction under 28 U. S. C. 1254.

Constitutional and Statutory Provisions Involved

The pertinent provisions of Amendment V of the Constitution, 18 U. S. C. 401, 18 U. S. C. 402 and Rule 7(a) of the Federal Rules of Criminal Procedure are set forth in Appendix A, *infra*.

Questions Presented

1. Whether there was evidence that petitioners had knowledge of the existence of the order for disobedience of which they were convicted of contempt.

2. Whether disobedience of an order requiring a convicted defendant to surrender for commitment is punishable as a contempt.

3. Whether criminal contempt may be punished by a prison sentence of more than one year.

4. Whether it was an abuse of discretion to sentence petitioners to imprisonment for three years.

Statement of the Case

The petitioners were separately tried and convicted of criminal contempt of an order of the District Court, entered July 2, 1951, requiring them to surrender for service of their sentences for conspiracy to violate the Smith Act, after affirmance of their convictions by this Court in *Dennis* v. *United States*, 341 U. S. 494. The contempt sentence of each petitioner was to imprisonment in a penitentiary for three years, consecutive upon his five year sentence in *Dennis*. (R. 72, 73.)

The two cases involve similar facts and identical questions of law.[2] They were initiated by affidavits of the United States Attorney upon which the District Court issued orders requiring petitioners to show cause why they should not be adjudged in contempt (R. 1-4). Each affidavit charged, on information and belief, that the accused "well knew of the outstanding order and decree of this Court," dated July 2, 1951, requiring him to surrender for commitment in the *Dennis* case, "and was in wilful and deliberate disobedience and resistance to said lawful order" (R. 3). Specifications of criminal contempt subsequently filed by the United States Attorney similarly charged each petitioner with "wilfully and knowingly disobeying and resisting" the order of July 2, 1951 (R. 4).

Each petitioner moved to dismiss the proceeding against him on the ground that disobedience of an order requiring a convicted defendant to surrender for commitment is not punishable as a contempt (R. 6). These motions were denied (*ibid.*) and the cases tried by the court without a jury. The evidence introduced by the Government established the following:[3]

In 1949, upon the convictions in *Dennis*, petitioners were sentenced to imprisonment for five years and were thereafter enlarged on bail pending appeal (R. 7, 44-56). On June 4, 1951, this Court affirmed their convictions (R. 8).

On June 28, 1951, the United States Attorney served petitioners' counsel with a notice that on July 2 he would

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[2] There are no material differences in the proceedings in the two cases which were consolidated in the Court of Appeals and disposed of in a single opinion (R. 74). The printed record contains (1) all of the pertinent proceedings in the *Green* case and (2) pertinent portions of the proceedings in the *Winston* case which are not duplicated in the *Green* record. Record citations are confined to the proceedings in the *Green* case except where differences in the *Winston* record are referred to.

[3] Petitioners offered no evidence.

whereas petitioners "voluntarily" submitted themselves to the authority of the court. But petitioners make no mention of the further fact that for nearly five years they had flouted the authority of the court before they decided to surrender themselves. The only reasonable distinction to be found in these facts is that the petitioners were more adept than their co-fugitives in evading the long arm of the law, as evidenced by their remaining at large for such a greater length of time.[7]

Inasmuch as Hall and Thompson received as long or longer sentences for a shorter period of disobedience, there could hardly be an abuse of discretion by the lower court in sentencing the petitioners to three years imprisonment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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Attorneys.

MAY 1957.

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[7] Hall remained at large for a period of three months and received a sentence of three years imprisonment. Thompson evaded capture for nearly twenty-six months and was imprisoned for four years.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 100

GILBERT GREEN AND HENRY WINSTON,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (R. 73) [1] is reported at 241 F. 2d 631. The opinion of the District Court in *United States* v. *Green* (R. 66) is reported at 140 F. Supp. 117.

Jurisdiction

The judgments of the Court of Appeals were entered on February 11, 1957. On February 21, 1957 an order was entered by Mr. Justice Harlan extending the time for filing the petition for certiorari to April 12, 1957. The petition

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[1] "R." refers to the printed record.

present to the District Court a proposed order that petitioners "personally surrender to the United States Marshal" on that date (R. 7, 57-60). The following day, counsel for petitioners advised the District Judge Ryan before whom the matter was pending that they would have all of the *Dennis* defendants in court on July 2. Counsel thereupon notified the defendants, including petitioners, to be in court on July 2, and was assured by them that they would be present (R. 8-11).[4]

Petitioners did not appear on July 2, at which time Judge Ryan signed the proposed order requiring their surrender, declared their bail forfeited, and issued bench warrants for their arrest (R. 7, 12, 59-60). They were not apprehended but surrendered voluntarily, Green on February 27, 1956 and Winston on March 5, 1956 (R. 13, 42).

Immediately prior to his surrender, each petitioner mailed a statement to the press announcing that he would give himself up and stating the reasons for his earlier failure to do so. In substance, petitioners stated that they had chosen flight in 1951 as a means of resisting what they believed to be a trend toward war and fascism in this country, and that their surrender was the result of what they regarded as a change in the political climate which made possible the restoration of the Bill of Rights and the preservation of peace (R. 20, 39-42, 64-65). Green made similar statements when interviewed by the press upon his surrender (R. 15-18). These statements acknowledge that, as counsel conceded, both petitioners had fled to evade imprisonment. However, there is nothing in the statements or in any of the other evidence to indicate that either petitioner had actual notice or knowledge of the order of July 2, 1951 which he was charged with wilfully and knowingly disobeying.

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[4] The facts concerning counsels' representation to Judge Ryan and notification of petitioners were established by the introduction in evidence of the July 3, 1951 transcript of colloquy in the *Dennis* case (R. 8-11).

At the close of the evidence, each petitioner moved for acquittal on the ground that the evidence was insufficient to sustain a conviction (R. 21). These motions were denied, as was petitioners' contention that a prison sentence for criminal contempt may not exceed a term of one year (R. 31). The District Court adjudged each petitioner in contempt and sentenced him to the penitentiary for three years, consecutive upon the five year sentence imposed in the *Dennis* case (R. 72-73). The Court of Appeals affirmed (R. 79).[5]

Summary of Argument

I. There was no evidence that petitioners had knowledge of the existence of the order which they were convicted of "knowingly disobeying."

As the District Court's summary of the evidence demonstrates, there was no direct evidence of such knowledge. Nor was there circumstantial evidence from which knowledge could be inferred. The proof that petitioners knew they were to appear in court on July 2, 1951, the inference that they must have realized that they might be committed on that day, and the acknowledged fact that they fled to avoid service of sentences they knew were in store for them cannot sustain the convictions. Proof that they had knowledge of the July 2, 1951 order for their surrender was required. But all of their conduct was fully consistent

[5] In the Court of Appeals, petitioners did not brief or argue the insufficiency of the evidence or the court's want of jurisdiction to hold them in contempt since both issues had been decided adversely to them by the same court in affirming the convictions of two other *Dennis* defendants who had absconded. *United States* v. *Hall*, 198 F. 2d 726, cert. den. 345 U. S. 905; *United States* v. *Thompson*, 214 F. 2d 545, cert. den. 348 U. S. 841. However, petitioners expressly reserved the right to present to this Court the issues not argued in the Court of Appeals (R. 74).

with ignorance of the existence of that order. Accordingly, the evidence cannot give rise to an inference of guilty knowledge, much less prove it beyond a reasonable doubt.

The convictions cannot be sustained on the theory adopted in *United States* v. *Hall* that petitioners had "notice" of the order of July 2.

In the first place, all that the evidence shows is that petitioners' counsel informed them that their presence in court on July 2 was required. There was no evidence that petitioners were notified that an application for an order for their surrender would be made on that day.

Second, petitioners were charged with disobedience of the order of July 2 which they "well knew" to be outstanding. Accordingly, the convictions cannot be sustained on the theory that although petitioners had no actual notice or knowledge of the order, they were chargeable with notice of it as a matter of law.

Finally, the proposition that one who has notice of an application for an order may be held liable for violating it is inapplicable to criminal contempts. The authorities uniformly hold that actual knowledge of the making of an order is prerequisite to a conviction for contempt of its provisions. Moreover, a contrary rule would deny the accused the presumption of innocence and violate due process.

Nor can the convictions be sustained on the theory, also advanced in the *Hall* case, that petitioners committed contempt, not by violating the July 2 order for their surrender, but in disobeying a prior order (presumably made on June 29) that they appear in court on July 2. In the first place, there was no evidence that the District Judge made any such order, and the trial court made no finding to that effect. Moreover, since petitioners were tried for

and convicted of violating the order of July 2, the convictions cannot be sustained on the ground that they violated a different order, thereby committing a different offense.

II. Disobedience of the order requiring petitioners to surrender for commitment is not punishable as a contempt.

The proceedings against petitioners and the other two *Dennis* defendants who absconded appear to be the only cases in the entire history of Anglo-American law in which a defendant, enlarged on bail, has been prosecuted for criminal contempt of an order for his appearance or surrender.

The history of 18 U. S. C. 401 and an analysis of its provisions demonstrate that the contempt prosecutions of the *Dennis* fugitives are not only unprecedented but unauthorized.

Since section 7 of the Judiciary Act of 1789 did not define "contempts" its application was confined to conduct which was punishable as a contempt at common law. The common law did not punish absconding in violation of an order for the appearance or surrender of the accused as a contempt but by a process of outlawry which became final only after the failure of the accused to respond to five successive orders for his appearance. Inasmuch as the offense of absconding was not a contempt at common law, it was not punishable as such under section 7 of the Judiciary Act.

The Act of March 2, 1831 did not extend but curtailed the range of conduct which the courts could punish as contempt. 18 U. S. C. 401 was derived from and has the same purport as the 1831 Act. It does not define contempts but, like its predecessor, is cast in the form of a limitation on the judicial power to punish them. Accordingly, the third clause of that section does not enlarge the class of

orders for disobedience of which the contempt power may be invoked. The contrary holding in the *Hall* case misreads the text of 18 U. S. C. 401 and ignores its origin and history.

The decision in *Hall* also ignores the fact that the extraordinary power of summary punishment exercised in contempt cases is bottomed on the necessities of the administration of justice. The total lack of precedent for the proceedings against the *Dennis* fugitives demonstrates that there is no foundation in necessity for this novel use of the contempt power. Moreover, the innovation sanctioned in *Hall* has a vindictive quality, since it was conceived at the height of the anti-Communist hysteria and has been used exclusively against four Communists to impose punishment over and above their sentences for a political crime.

III. The trial court was without power to sentence petitioners to terms in excess of one year.

The federal courts do not have unlimited power to punish criminal contempts by imprisonment for any term up to life, but are restricted to the imposition of sentence as in the case of offenses which are not infamous. Since an infamous offense is one which may be punished by confinement in a penitentiary, and such confinement is authorized where the sentence exceeds one year, it follows that all offenses punishable by imprisonment for a longer term are infamous.

The conclusion that contempt is not an infamous offense (and hence not punishable by imprisonment for more than a year) finds support in the provisions of 18 U. S. C. 401 and its predecessors and in the principle that ambiguities in a criminal statute must be resolved in favor of the

accused. And the fact is that there is no reported case, federal or state, of infamous punishment for contempt prior to 1916.

This century and a quarter of undeviating American practice was frozen into statutory law by section 24 of the Clayton Act of 1914 which provides that contempts excluded from the provisions of sections 21 and 22 "may be punished in conformity to the usages at law and in equity now prevailing." The changes in the phraseology of section 24 which accompanied its codification in 18 U. S. C. 402 did not change the effect of the original enactment. Section 402, like its predecessor, codifies the usage as to punishment which prevailed in 1914 and prohibits contempt sentences in excess of one year.

The same limitation is imposed by Rule 7(a) of the Federal Rules of Criminal Procedure that, "an offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment." Since contempts never have been and, under Rule 42, are not prosecuted by indictment, they may not be punished by imprisonment for more than a year.

It is significant there have been only two reported state court cases of infamous punishment for contempt, in both of which the sentences were held invalid on appeal. And no state statute which regulates criminal contempt sentences provides for a term in excess of one year.

Since 1916, there have been nine reported cases in the federal courts in which criminal contempt sentences in excess of one year have been affirmed. But the question presented here was not raised or considered in any of them except *Creekmore* v. *United States* (C. A. 8, 1916), which does not mention section 24 of the Clayton Act and antedates the Federal Rules by many years.

The court below rejected petitioners' construction of section 24 of the Clayton Act. It did not regard the century and a quarter during which there had been no infamous punishment for contempt as establishing a "prevailing usage." It accounted for the practice by assuming that no case presented itself before 1914 which merited a longer sentence. The assumption is patently unreasonable. Moreover, the court ignored the fact that Congress enacted the contempt provisions of the Clayton Act because of its recurring concern over judicial usurpation of power in contempt cases and evidently intended by the prevailing usage clause of section 24 to prohibit innovations in the punishment of contempts not covered by sections 21 and 22. Finally, the court's construction of the prevailing usage clause makes it a redundancy. For the court could not suggest any practice which the clause was designed to freeze into statutory law.

Contrary to the opinion below, the enactment in 1954 of 18 U. S. C. 3146, making bail jumping a crime punishable by imprisonment for five years, is wholly irrelevant to the character of the sentence which may be imposed for criminal contempt.

At the very least, it is a tenable conclusion that section 24 of the Clayton Act, Rule 7(a) of the Criminal Rules and 18 U. S. C. 401 limit criminal contempt sentences to terms of not more than a year. If so, the conclusion should be adopted. For a contrary conclusion would require the Court to decide whether criminal contempt is a "crime" within the meaning of the clause of the Fifth Amendment requiring infamous crimes to be prosecuted by indictment. The Court has never been confronted with this question. But many constitutional and statutory provisions for the protection of those accused of crime have been held applicable to criminal contempts. The one exception is the holding that criminal contempts are not covered by the

jury trial requirement of the Sixth Amendment. The historical error on which this exception rests should not be extended to other constitutional guarantees.

While the opinion below acknowledged the existence of the constitutional question, the court did not consider it relevant to the construction of section 24 of the Clayton Act, Rule 7(a) and 18 U. S. C. 401. It resolved the question against petitioner because "it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be by an indictment, and yet that it need not be tried to a jury." But there is no rule of construction which requires compounding an error for the sake of being consistently wrong. Moreover, petitioners' contention involves no anomaly. If criminal contempts are not subject to infamous punishment, they are not infamous crimes within the Amendment and need not be prosecuted by indictment.

If Congress thinks it desirable to exact infamous punishment for contemptuous conduct of a serious nature, it can of course make such conduct a crime. Accordingly, adoption of petitioners' contention will simply assure an accused the protection of indictment and trial by jury before he can be convicted of an infamous offense, penalized by a prolonged penitentiary sentence and subjected to the disabilities imposed upon felons.

IV. The trial court abused its discretion in sentencing petitioners to imprisonment for three years.

Except for the cases of the other *Dennis* fugitives (Hall and Thompson), there has been no reported contempt sentence in excess of two years. Petitioners' cases are distinguished from those of Hall and Thompson since the latter were apprehended while petitioners voluntarily submitted themselves to the authority of the court.

ARGUMENT

I. There Was no Evidence that Petitioners Had Knowledge of the Existence of the Order Which They Were Convicted of "Knowingly Disobeying."

Each petitioner was charged with and convicted of "wilfully and knowingly disobeying" the District Court's order of July 2, 1951 which he "well knew" to be outstanding, requiring him to surrender to the marshal for commitment (R. 3-4). Knowledge by petitioners of the existence of this order was therefore an essential element of the offense[6] and one which required proof beyond a reasonable doubt. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444.

The Government, however, introduced no proof that petitioners had knowledge of the order in question. This appears from the District Court's summary of the evidence in its written opinion in the *Green* case (R. 67):[7]

> "The evidence showed that Mr. Sacher, an attorney in the [*Dennis*] case, personally advised the respondent on June 29th that he had to be in Court on July 2, 1951. There was other evidence that thereafter, but before July 2, respondent left his New York City address and was not seen there again. There was further evidence that several days before respondent surrendered, he issued a written statement to the press admittedly signed by him which conclusively established that he had remained in hiding to avoid serving the sentence to which he had been committed. Furthermore, on the day on which he surrendered, respondent made statements to the reporters who

[6] This follows not only from the nature of the charge but from the principle that a person may not be convicted of contempt of an order unless he had knowledge of its existence and intentionally disobeyed it. *Wilson* v. *North Carolina*, 169 U. S 586, 600; *Kelton* v. *United States*, 294 F. 491, cert. den. 264 U. S. 590.

[7] The District Court did not write an opinion in the *Winston* case.

> were present on the Courthouse steps which also conclusively established that he had knowingly and wilfully absented himself so as to avoid serving a sentence which he knew had been imposed upon him."

The court concluded (*ibid.*) that this evidence "was sufficient to establish, beyond a reasonable doubt, that the respondent knowingly disobeyed the order [of July 2, 1951] of Judge Ryan".

This conclusion is a *non-sequitur*. The court cited no direct evidence that petitioners had knowledge of the order, and there was none. Nor, as appears from the court's summary, was there circumstantial evidence which could give rise to an inference of the required *scienter*.

The evidence established that petitioners knew they were to appear in court on July 2 when, in all probability, they would be committed as a result of the affirmance of their convictions. It is therefore obvious, as their counsel conceded, that petitioners fled to avoid service of the sentences which they knew were in store for them. That this was the purpose of their flight was further indicated, as the District Court found in the passage quoted above, by the statements they made upon surrendering (R. 15-18, 20, 39-42, 64-65). Thus petitioners' realization that they would probably be committed on July 2 is sufficient to account for their flight and for the reasons they later gave for absconding. But proof that petitioners believed they were to be committed on July 2 cannot sustain their convictions. Proof that they had knowledge of the July 2 *order for their surrender* is required. As we have shown, however, all of their conduct is explainable on the premise that they had no knowledge of that order, and is therefore consistent with ignorance of its existence.[8] Accordingly, the evidence can-

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[8] In the *Winston* case, the District Court found that Winston's statement to the press upon his surrender showed "that he intentionally failed to surrender, knowing that he was expected to surrender

not give rise to an inference of guilty knowledge, much less prove it beyond a reasonable doubt. *Pennsylvania Ry. Co.* v. *Chamberlain*, 288 U. S. 333, 339-40.

Apparently recognizing the vulnerability of its finding on the issue of knowledge, the District Court made the further finding in its written opinion in the *Green* case "that respondent had *notice* of the order [of July 2, 1951] and wilfully disobeyed it" (R. 67, emphasis supplied).[9] The court cited *United States* v. *Hall* (C. A. 2), 198 F. 2d 726, in support of this finding.

In the *Hall* case, a majority of the court, Judge Biggs dissenting, sustained the conviction for contempt of another absconding *Dennis* defendant. Hall was tried on a charge identical with the charges against petitioners, and the evidence against him was substantially the same as that in the present cases.[10] Hall, like petitioners, was notified by his counsel on June 29, 1951 that his presence in court was required on July 2, and absconded prior to that date. Before his flight, he made a speech which demonstrated awareness that he was about to be imprisoned. When apprehended, he was found to have disguised his appearance. There was no other evidence of *scienter*.

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because of an order of this Court." The court stated that, "This appears very clearly from the fourth paragraph of this statement in which he says that he chose the path he did as a method of struggle against a growing fascist menace, and that the hardships and privations that this entailed were difficult." (R. 43.) Obviously, the court's paraphrase of the statement does not show that Winston had knowledge of the order for his surrender, but establishes at most that he fled to avoid imprisonment. The full text of the statement (R. 39-42) proves no more.

[9] In the *Winston* case, the court made no finding as to notice, but rested its judgment entirely on the finding that Winston had knowledge of the order (R. 42-43).

[10] Hall, however, did not surrender voluntarily but was apprehended. See 198 F. 2d at 727.

The Court of Appeals did not consider whether the evidence was sufficient to establish that Hall had actual knowledge of the order of July 2, 1951. It held, however (at p. 730) that the record supported a finding "that respondent had complete notice of the order and wilfully disobeyed it." To this it added (*id.*, ftn. 7):

> "That this was a notice to appear for the order of commitment, rather than that order itself, raises no question; the notice, too, formed part of the court's command. See *Pettibone* v. *United States*, 148 U. S. 197, 206."

The court's theory of guilt is explained by the passage from the *Pettibone* case upon which it relied. The passage reads (148 U. S., at 206, emphasis supplied):

> "In matters of contempt, persons are not held liable for the breach of a restraining order or injunction, unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued, or the order entered, *or at least that application is to be made;* but without service of process or knowledge or *notice or information of the pendency of the proceedings,* a violation cannot be made out. 2 Dan. Chan. Pr. (4th Amer. ed.) 1684; 2 High on Injunctions (3d ed.) §§ 1421, 1452; *Winslow* v. *Nayson,* 113 Mass. 411." (Emphasis supplied.)

The court's citation of this passage indicates that it sustained Hall's conviction on the theory that notice to him that an application would be made for the order of July 2, 1951, followed by his flight, was sufficient to sustain the charge that he was in criminal contempt of the order once it was entered. There are three errors in this theory of guilt as applied to petitioners.[11]

First, there was no evidence that petitioners were notified that application was to be made for the order of July 2.

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[11] The affirmance of Hall's conviction was erroneous for the same reasons.

All that the evidence shows is that their counsel informed them that their presence in court on July 2 was required (R. 8-11). There is nothing to indicate that counsel informed them of the purpose for which their appearance was required, and there is therefore no basis in the evidence for the inference that they knew that application would be made for an order requiring their surrender.[12] Indeed, the written opinion of the District Court in the *Green* case contains no finding that Green was notified of the application. All that the court found was that counsel "personally advised the respondent [Green] on June 29 that he had to be in Court on July 2, 1951" (R. 67). Thus the court's finding fails to support its conclusion (*ibid.*) that Green "had notice of the order".[13]

Second, the charges against petitioners were not based on the theory that they had notice that the order of July 2 would be applied for. Instead, they were charged with disobedience of the order, knowing that it had been made. The affidavits of the United States Attorney upon which the proceedings were initiated alleged that petitioners "well knew of the *outstanding* order and decree of this Court" (R. 3, emphasis supplied), and both the order to show cause and the specifications charged that petitioners "knowingly" disobeyed the July 2 order (R. 1, 4). Accordingly, the

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[12] Of course, counsel's knowledge that the application would be made cannot be imputed to his client in a criminal contempt proceeding. *In re Cary*, 10 F. 622, 627; *In re Kwelman*, 31 F. Supp. 23.

[13] On the basis of identical evidence in the *Winston* case, the court made the similar finding that Winston "knew that he was supposed to be in court and advised to be in court" (R. 42). The court added, however, that Winston "knew certainly from the conversation with his counsel on the previous Friday that such an order [for his surrender] was being prepared; he knew that he was expected to surrender himself" (*ibid.*). If this conclusion can be construed as a finding that Winston knew that the order of July 2 was to be applied for, it is without support in the evidence or in the court's own finding as to the evidence.

conviction cannot be sustained on the theory that although petitioners had no actual notice or knowledge of the order, they are chargeable with notice of it as a matter of law. *Cole* v. *Arkansas*, 333 U. S. 196.

Finally, the statement in *Pettibone*, quoted above, that a person who has notice of an application for an injunction may be held liable for its breach, is inapplicable to liability for *criminal* contempt. The passage containing this statement was dictum [14] in which the Court did not distinguish between civil and criminal contempts. But the three authorities which the opinion cites state unequivocally that actual knowledge of the making of an order is prerequisite to a conviction for contempt of its provisions.

2 Daniels, Chancery Pleading and Practice § 1684 (4th Amer. ed.) states the rule applicable to criminal contempts as follows:

> "Before the Court will punish for a breach of an injunction or restraining order, it must be clear that the party *knew that the injunction had been issued, or that the order had been made* * * *.
>
> "In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given. Thus, it was held by Lord Harwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice; and if the party remains in Court, until the order is about to be made, he cannot, by leaving *at that instant*, avoid its consequences." (Emphasis supplied.)

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[14] The case involved the validity of an indictment for obstructing justice by committing acts prohibited by a labor injunction. The Court held the indictment defective because it failed to allege that the accused had knowledge of the issuance of the injunction or even of the pendency of the proceeding which they were charged with obstructing.

Winslow v. *Nayson*, 113 Mass. 411, 420 summarizes the authorities as holding that:

> "* * * when the court has pronounced an order for the immediate issue of an injunction, a person who has *actual notice that the order has been made* and disobeys it, may be held guilty of a contempt, even before the injunction has been issued, or the order has been formally drawn up and served upon him." (Emphasis supplied.)

Similarly, 2 High on Injunctions § 1421 (3rd ed.) states:

> "The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was *actually apprised of the existence of the order* at the time of committing the acts constituting the violation." (Emphasis supplied.)

See also, *id.* § 1422.

It is clear from *Pettibone's* citation of these authorities that the Court did not intend to intimate that a person may be held guilty of criminal contempt without proof of actual knowledge of the existence of the order he is charged with disobeying. Research has disclosed no case other than the cases of the four absconding *Dennis* defendants [15] which so holds.[16] Contrariwise, it has been held that a defendant in a suit for an injunction cannot be held in criminal contempt for violating the injunction after learning that the case had been decided against him but before being informed that the court had directed that the injunction issue.

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[15] Including *United States* v. *Thompson* (C. A. 2), 214 F. 2d 545, which followed and was decided on the authority of the *Hall* case.

[16] Judge Biggs' dissent in the *Hall* case states (at 733) that "no case has been cited to us and I have found none where the doctrine of constructive notice has been applied in a criminal case including a criminal contempt proceeding."

Dowagiac Mfg. Co. v. *Minnesota Moline Plow Co.*, 124 F. 736, aff'd, 129 F. 1005.[17]

The decision in *Hall* is not only contrary to the authorities but violates constitutional guarantees. In essence, it rests on the proposition that an accused who had notice of an application for an order will be presumed to have knowledge of the order, if one is issued. But applications do not automatically or necessarily eventuate in orders. Courts frequently deny them or grant them in modified form. Hence, a person who has notice of an application will nevertheless remain in ignorance of the result unless it is communicated to him in some way. There is therefore no rational basis for presuming knowledge of an order from notice that an order will be applied for. Whatever the rule may be in civil suits, the presumption indulged in by the *Hall* majority is impermissible in a criminal case. For it denies the accused the presumption of innocence and violates due process. Cf. *Tot* v. *United States*, 319 U. S. 463.

As the dissenting opinion in *Hall* states (at 734):

> "To base a conviction for criminal contempt upon *constructive* notice is too close to basing a conviction on *constructive* contempt. But the question presented in the instant case is really one of due process. Proof of actual notice or knowledge on Hall's part that the order of July 2 had been entered is a constitutional requirement under all the circumstances." (Emphasis in the original.)

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[17] There, the defendant in a patent infringement case was charged with criminal contempt for making sales of the infringing device after the Court of Appeals had reversed a decision in its favor and remanded with directions that an injunction issue. The defendant was acquitted on the ground that there was no proof that it had knowledge of the direction of the Court of Appeals that an injunction issue, and that such knowledge could not be presumed from the fact that the defendant knew that the judgment in its favor had been reversed.

We submit that Judge Biggs is right, and that since there was no proof that petitioners had actual notice or knowledge of the existence of the order of July 2, 1951, their convictions cannot stand.

The majority opinion in *Hall* suggests an alternative theory of guilt. It states (at 730):

> "Hence from the uncontroverted evidence it appeared that there was a specific order for his [Hall's] appearance, that was directly communicated to him, and that he wilfully and intentionally absconded two days before his ordered appearance."

The suggestion seems to be that Hall's contempt lay, not in violating the July 2, 1951 order for his surrender, but in disobeying a prior order (presumably made on June 29) that he appear in court on July 2.[18] The suggestion is palpably erroneous as applied to petitioners.[19]

In the first place, there was no evidence that on June 29 Judge Ryan ordered petitioners to appear on July 2, and the trial court made no finding that such an order was made. All that the evidence showed or that the trial court found was that on June 29, petitioners' counsel stated to the judge that he would have his clients in court on the following Monday, and thereafter informed petitioners that their presence on that day was required (R. 9-11, 42, 67). Indeed, as the *Hall* dissent points out (at 732) it elsewhere appears that on June 29 Judge Ryan believed himself powerless to make any orders in the *Dennis* case because he had not yet received the mandate of this Court.

Furthermore, the petitioners were charged with contempt of the order of July 2 and were tried for and convicted of that offense. Obviously, their convictions cannot

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[18] The dissenting judge believed (at 735) that this was the ground on which the majority based its decision.

[19] It was also erroneous on the facts of the *Hall* case.

now be sustained because they violated a different order thereby committing a different offense. *Cole* v. *Arkansas, supra.*

We have shown that there was no evidence that petitioners had knowledge of the order which they were charged with disobeying. We have further shown that the novel theories of guilt advanced by *Hall* as a means of dispensing with evidence of knowledge are fallacious and violate constitutional rights. Accordingly, the convictions should be reversed with directions to enter judgments of acquittal.

II. Disobedience of the Order Requiring Petitioners to Surrender for Commitment Is not Punishable as a Contempt.

United States v. *Hall, supra,* appears to be the first case in the entire history of Anglo-American law in which a defendant, enlarged on bail, was prosecuted for criminal contempt of an order requiring him to appear for trial or surrender for commitment.[20] And there appear to have been no similar prosecutions since *Hall* except against the other *Dennis* defendants who absconded, Thompson [21] and the petitioners. In all other cases of absconding, in the absence of a statute making bail jumping a crime, the practice in this country has been to forfeit the defendant's bail and issue a bench warrant for his arrest. No other

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[20] The dissent in the *Hall* case states (at 734): "Hall's counsel contends that in the whole course of our law as well as that of England there has been no proceeding like the one at bar. The view asserted may be an exaggerated one but exhaustive independent research has disclosed no similar case." It has been held, however, in cases where no order for appearance or surrender was entered, that bail-jumping is not a contempt. *State* v. *Jordy,* 161 La. 104, 108 So. 229; *In re Dill,* 32 Kas. 668, 5 P. 39; *In re Kessler,* 32 Kas. 693, 5 P. 50. Cf. *Ingle* v. *State,* 8 Blackf. 574 (Ind.); *Conley* v. *United States,* 59 F. 2d 929.

[21] See *United States* v. *Thompson, supra.*

punishment is imposed. See, e.g., Orfield, *Criminal Procedure from Arrest to Appeal* (1947), pp. 126-127; *Field* v. *United States*, 193 F. 2d 86, 90; *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 528.[22]

The lack of a single instance prior to 1951 in which the contempt power was asserted in a case of this character either at common law or under American contempt statutes is persuasive evidence that the power is non-existent.[23] The history of 18 U. S. C. 401 and an analysis of its provisions confirm this conclusion.

18 U. S. C. 401 is the lineal descendant of Section 7 of the Judiciary Act of 1789, 1 Stat. 73, 83, which empowered the courts to punish "all contempts of authority in any cause or hearing before the same." Since Section 7 did not define "contempts," its application was confined to conduct which was punishable as a contempt at common law. *Savin, Petitioner*, 131 U. S. 267, 275-76.[24] Cf. *United States* v.

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[22] There have been numerous critiques of the operation of the bail system, including the practice in the case of absconders. See, e.g., Willoughby, *Principles of Judicial Administration* (1929), pp. 561-66; Beeley, *The Bail System in Chicago* (1927); *Report of the New York Crime Commission* (1927); *Report of the Minnesota Crime Commission* (1934); National Commission on Law Enforcement and Observance, *Report on Prosecution* (1931), pp. 89-92. Several of these (e.g., the New York and Minnesota Crime Commission Reports) propose legislation to make bail jumping a crime. But none of them suggests the expedient of the issuance of an order for surrender followed by proceedings in criminal contempt for its disobedience.

[23] "* * * while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given." Frankfurter, *Some Reflections on the Reading of Statutes* (1947).

[24] The opinion suggests that the contempt power under the Judiciary Act may be more limited than that exercised at common law. For Mr. Justice Harlan wrote (*ibid.*): "Under that statute [the Judiciary Act] the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law *as were applicable to our situation.*" (Emphasis supplied.)

Palmer, 3 Wheat. 610, 630; *Jerome* v. *United States* 318 U. S. 101, 108, ftn. 6.

The comomn law did not punish absconding in violation of an order for the appearance or surrender of the fugitive, as a contempt. Instead, the absconder was subject to outlawry upon becoming *quinto exactus,* that is upon failing to appear after his presence had been demanded in five successive county courts. 4 *Blackstone, Commentaries* (N. Y. 1854), 318-19; 2 Hale, *Pleas of the Crown* (Dublin, 1778), 201, 224; 1 Pollock and Maitland, *The History of English Law* (2d ed., 1898), 539. If he surrendered before the fifth exaction, he was not held in contempt of the prior demands for his appearance but received no punishment at all. Hale, *loc. cit.* Since absconding in disobedience of an order for appearance or surrender was not a contempt at common law, it was not punishable as such under Section 7 of the Judiciary Act.

Section 7 of the Judiciary Act was supplemented by the Act of March 2, 1831, 4 Stat. 487. The history of that legislation, enacted after the failure of the effort to impeach Judge Peck and designed to prevent judicial usurpation of power to punish for contempt, is too familiar to require repetition. The Act recited that it was "declaratory of the law concerning contempts of court," and provided that:

> "* * * the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, shall not be construed to extend to any cases except * * * the disobedience or resistance by * * * any other person or persons, to any lawful writ, process, order, rule, decree or command of said courts."

The wording of the statute makes it clear that Congress did not intend to extend the contempt power to conduct which was not punishable as a contempt under Section 7 of the Judiciary Act. On the contrary, as the Court has frequently held, the language and legislative history of the Act of 1831 demonstrate that it "represented a deliberate Congressional purpose drastically to curtail the range of

conduct which courts could punish as contempt." *In re Michael*, 326 U. S. 224, 227; *Nye* v. *United States*, 313 U. S. 33; *Cammer* v. *United States*, 350 U. S. 399; *Savin, Petitioner, supra.* See also, Frankfurter and Landis, *Power of Congress over Procedure in the "Inferior" Federal Courts—A Study in the Separation of Powers*, 37 Harv. L. Rev., 1010. It is obvious, therefore, that since disobedience of an order for the surrender of a defendant enlarged on bail was not a contempt under the Judiciary Act of 1789, it did not become a contempt by virtue of the Act of 1831.

18 U. S. C. 401 has the same purport as the Act of 1831. *Cammer* v. *United States, supra.* This appears not only from the fact that Section 401 was derived from the earlier statute (*ibid*) but from its terms. The section does not define contempts. Instead, like its predecessor, it is cast in the form of a limitation on the judicial power to punish them. It authorizes a court to punish "such contempt of its authority, and none other, as * * * (3) Disobedience to its lawful * * * order." The term "contempt of its authority" was taken from the Judiciary Act of 1789 and, like the latter, refers to conduct which was punishable as a contempt at common law. In that context, the effect of the third clause of the section is simply to preserve the contempt power over order-disobedience of the kind which the common law punished as contemptuous. It does not enlarge the class of orders for disobedience of which the contempt power may be invoked.[25]

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[25] This was made even clearer by the phraseology of the immediate predecessor to section 401, 28 U. S. C. (1940 ed.) 385. The latter, in pertinent part, provided: "The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command of the said courts."

It follows that since disobedience of an order that a fugitive surrender was not a contempt at common law or under the Act of 1789, it is not a contempt under 18 U. S. C. 401.

The court in the *Hall* case, *supra*, at 727, acknowledged that the common law did not consider an absconder who violates an order for his surrender to be in contempt. Nevertheless, it sustained the conviction because it believed that the text of 18 U. S. C. 401 embraces the disobedience of all lawful orders, including those not punishable as contempts at common law. As we have shown, the court was wrong. But even if there were warrant for its conclusion in the text of the section, the court's failure to consider the origin and history of the legislation would provide a blatant example of surrender to the "tyranny of literalness." *United States* v. *Witkovich*, 353 U. S. 194 199.[26]

The decision in *Hall* not only contravenes the purpose of the Act of 1831 and its successors. It also violates the principle which governs the scope of contempt jurisdiction. This court has often held that because of the summary nature of criminal contempt proceedings and the fact that they are tried without a jury, the contempt power should be limited to "the least possible power adequate to the end proposed." See, *e.g.*, *In re Michael*, *supra*, at 277. As was said in *Offutt* v. *United States*, 348 U. S. 11, 14:

> "The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes gen-

[26] 18 U. S. C. 3146, enacted two years after the *Hall* case, makes bail jumping a crime and provides that, "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." This savings clause, apparently inspired by the erroneous decision in *Hall*, obviously does not enlarge the contempt power defined in section 401 or have any relevance to the construction of that section.

erally, is that the necessities of the administration of justice require such summary dealings with obstructions to it. It is a mode of vindicating the majesty of the law in its active manifestation."

At least since outlawry fell into disuse, English and American courts have regarded forfeitures of bail and the issuance of bench warrants as sufficient to "vindicate the majesty of the law" against absconders. The total lack of precedent attests that there is no foundation in necessity for the novel use of the contempt power sanctioned in *Hall*.[27] Moreover, this judicial innovation has a vindictive quality which the court should not countenance. For it was conceived at the height of the anti-Communist hysteria and has been used exclusively against four Communists to impose punishment over and above their sentences for a political crime.

Since, as we have shown, the District Court was without jurisdiction to proceed against petitioners for contempt, their convictions should be reversed with directions to dismiss the proceedings.

III. The Trial Court Was Without Power to Sentence Petitioners to Terms in Excess of One Year.

The question presented by the three-year sentences against petitioners is whether the federal courts have unlimited power to punish criminal contempt by imprisonment for any term, including life.[28] It is petitioners' position that this question must be answered in the negative,

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[27] If the legislature believes that forfeiture of bail is insufficient punishment for absconding, it can of course make bail-jumping a crime. See, e.g., 18 U. S. C. 3146, *supra*, ftn. 26 and N. Y. Penal Law, Sec. 1694-a.

[28] Subject only to the limitation, if any, of the Eighth Amendment prohibition against cruel and unusual punishment.

and that the courts are restricted to the imposition of sentence for contempt as in the case of offenses which are not infamous.

An infamous offense is one which may be punished by confinement in a penitentiary. *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348. Such confinement is authorized where the sentence is for a term in excess of one year. 18 U. S. C. 4083.[29] It follows that all offenses punishable by imprisonment for more than one year are infamous. (See Notes of Advisory Committee on Rules to Rule 7, Federal Rules of Criminal Procedure.) Accordingly, if contempt is not an infamous offense, it may not be punished by a sentence in excess of one year.

Put in other words, it is petitioners' position that contempts are misdemeanors and not felonies as these are defined in 18 U. S. C. 1.[30]

As we shall show, the conclusion that contempt is not an infamous offense finds support in 18 U. S. C. 401 and, in any event, is required by Section 24 of the Clayton Act, 38 Stat. 739 [31] and by Rule 7 of the Rules of Criminal Procedure. Furthermore, a contrary conclusion would violate

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[29] Derived from the Act of March 3, 1865, 13 Stat. 500. See *In re Mills*, 135 U. S. 263, 270.

[30] In England, contempts have always been classified as misdemeanors. 7 Halsbury, *Laws of England*, 280; Fox, *Practice in Contempt of Court Cases*, 38 L. Q. Rev. 197. As the opinion of the trial court points out (R. 69), misdemeanors were punishable as infamous offenses at common law. However, all or substantially all of the states have classified crimes "as felonies or as misdemeanors accordingly as they are or are not punishable by imprisonment in the state prison or penitentiary." *Mackin* v. *United States, supra*, at 352-53; 1 Wharton, *Criminal Law* (12th ed.) 37. The same classification obtains federally by virtue of 18 U. S. C. 4083 and 18 U. S. C. 1.

[31] Now contained in 18 U. S. C. 402. See *infra*, p. 31.

the clause of the Fifth Amendment requiring the prosecution of infamous crimes by indictment.

18 U. S. C. 401, in language derived from the Judiciary Act of 1789, authorizes a federal court to punish contempts "by fine or imprisonment, at its discretion." [32] The court below thought that the words "at its discretion" gave the courts unlimited power over the length and character of prison sentences (R. 78). But there are countervailing considerations.

First, since the contempt statutes have always provided for fine *or* imprisonment, in the alternative, the courts are without power to impose both penalties for the same contempt. *In re Bradley*, 318 U. S. 50. This limitation is intelligible if the term "imprisonment" means a jail sentence of relatively short duration. But the statute would violate common sense if construed to authorize either a fine or imprisonment for life, but to prohibit a sentence of a $500 fine and ten days in jail.

Moreover, to construe "at its discretion" as authorizing infamous punishment would make every contempt a felony. But contempt embraces a wide range of offenses, including minor infractions which are punished, if at all, by small fines or nominal jail sentences. Surely, the equivocal reference to "discretion" in Section 401 is insufficient to impute to Congress the intention of subjecting every person found guilty of some minor contempt to the disabilities imposed on a felon.

The best that can be said of the punishment provisions of Section 401 is that they are ambiguous. Accordingly the ambiguity must be resolved in favor of the accused. *United States* v. *Universal C. I. T. Credit Corporation*, 344 U. S. 218, 221-22. This rule of construction has been held

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[32] Section 7 of the Judiciary Act of 1789 authorized the courts "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

to preclude infamous punishment for contempt under a state statute substantially identical with Section 401 except that it authorizes both fine *and* imprisonment for the same offense.[33] *Brown* v. *State*, 89 Okla. Cr. 443, 209 P. 2d 715.[34] And cf. *State* v. *Di Paglia* (Sup. Ct. Ia.), 71 N. W. 2d 601, which collects numerous state court decisions holding that unless the legislature has clearly manifested a contrary intention, the term "imprisonment" does not authorize infamous punishment but means confinement in a jail, not a penitentiary.

Thus, the wording of Section 401 and its predecessors supports the proposition that contempt may not be punished as an infamous offense. And the fact is that this limitation on the power to punish contempts was adhered to in practice from the adoption of the Judiciary Act of 1789 until 1916.[35] During that period, there was no reported case, federal or state, of a sentence in excess of one year or other infamous punishment for contempt.

In 1916 the Supreme Court of Iowa could state, upon invalidating a statute which authorized a penitentiary sentence for violation of a liquor injunction:

> "The authorities may be searched in vain for any precedent, under our constitutional form of government, holding it to be within the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt * * *"

Flannagan v. *Jepson*, 177 Ia. 393, 158 N. W. 641, 643.

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[33] The statute provides that, "Punishment for contempt shall be by fine or imprisonment, or both, at the discretion of the court." 21 Okla. Stats. 566.

[34] See also, *Rogers Mfg. Co.* v. *Rogers*, 38 Conn. 121, which states as axiomatic that imprisonment for contempt must be in a common jail and not elsewhere.

[35] The date of the decision in *Creekmore* v. *United States*, 237 F. 243, *infra*, p. 33.

The century and a quarter of undeviating American practice noted by the Iowa court was frozen into statutory law by Section 24 of the Clayton Act of 1914. Sections 21 and 22 of the Clayton Act relate to contempts for disobedience of court orders where the contemptuous conduct is a criminal offense under federal or state law. Section 22 requires contempts of this character to be tried by a jury and fixes the maximum punishment at imprisonment for six months and a fine (payable to the United States) of $1000. Section 24 of the same Act provides:

> "Nothing herein [in secs. 21 and 22] contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, *but the same, and all other cases of contempt not specifically embraced within section 21 of this Act, may be punished in conformity to the usages at law and in equity now prevailing.*" (Emphasis supplied.)[36]

Section 24 accomplishes two purposes. By its first clause, it excludes certain kinds of contempt (including the kind involved here) from the jury trial requirement and limitation on punishment contained in Section 22. By its second clause (which we have italicized), it limits the nature of the punishment for contempts of the excluded categories to that which prevailed on October 15, 1914, the date of enactment of the Act.

The legislative history contains no discussion of the second clause of Section 24, which we will refer to as the

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[36] The substance of sections 21, 22 and 24 of the Clayton Act is now contained in 18 U. S. C. 402 and (as to jury trials) 18 U. S. C. 3691. (See *infra*, p. 31.)

"prevailing usage clause." [37] But its language is plain and familiar principles of statutory construction require that it be given effect. *McDonald* v. *Thompson,* 305 U. S. 263, 266. Hence the punishment for contempts of the classes described in Section 24 must be determined by reference to the usage which prevailed in 1914.

As we have shown, the usage which prevailed without exception from 1789 until after the date of the Clayton Act was to punish contempts as offenses not infamous. Under the predecessor to 18 U. S. C. 4083 in force in 1914, all offenses punishable by prison terms in excess of one year were infamous. (See *supra,* ftn. 29.) Hence, Section 24 of the Clayton Act limited imprisonment for the contempts therein described to terms of not more than one year.[38]

Congress incorporated the substance of Section 24 of the Clayton Act into 18 U. S. C. 402 in the 1948 revision and codification of the criminal statutes. Section 402 substitutes the phrase, "in conformity to the prevailing usages at law" for the original wording, "in conformity to the usages at equity and law now prevailing." [38a] This modification in phraseology, however, did not change the effect of the original enactment. It is well established that "it

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[37] Congressman Clayton advised the House that contempts for disobedience of orders entered in actions to which the United States is a party were excepted from sections 21 and 22 so as not to weaken the power of the courts to enforce dissolution decrees in anti-trust cases. 48 Cong. Rec. 22591.

[38] This is twice the maximum term provided for the contempts covered by sections 21 and 22.

[38a] Section 151 of the Senate version of the pending Civil Rights Bill amends 18 U. S. C. 402 by making the maximum prison sentence of six months and fine of $1000 applicable to *all* cases of criminal contempt involving order-disobedience not committed by an officer of the court or in the presence of the court or so near thereto as to obstruct the administration of justice. See H. R. 6127, 85th Cong. 1st Sess.

will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199.[39] The Reviser's Notes to Section 402 specifically state that the differences in phraseology between that section and Sections 22 and 24 of the Clayton Act "do not, however, change their meaning or substance." (18 U. S. C. A. 402, Reviser's Notes.) This statement is entitled to great weight in construing the legislation. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U. S. 247, 255. Indeed, it is conclusive in the absence of any Congressional expression to the contrary.[40]

It is clear, therefore, that Section 402 did not change the date specified in Section 24 of the Clayton Act for determining the "prevailing usage." Accordingly, Section 402, like its predecessor, codifies the usage as to punishment which prevailed in 1914 and prohibits the courts from imposing contempt sentences in excess of one year.

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[39] Congress recognized that this rule of construction was applicable to the codification of Title 18. See report of Representative Keogh to the American Bar Association, 92 Cong. Rec. A-61, A-62.

[40] The Reviser's Notes to Title 18 were made an appendix to the House Committee Report. This was done after the Reviser had informed the Committee that, "Every substantive change, no matter how minor, is fully explained [in the Reviser's Notes] so that if you in your discretion see fit to make these notes part of your report, they will adequately serve to interpret every proposed change." (Hearings before Committee on Revision of the Laws, 78th Cong., 2d Sess., on H.R. 5450, Dec. 6, 1944, p. 11.) Moreover, the reports of both the House and the Senate Committees state that these Notes contain a detailed explanation of every change made in the text of prior legislation. H. Rept. No. 304, 80th Cong., 1st Sess., on H.R. 3190, p. 9; S. Rept. No. 1620, 80th Cong., 2d Sess., on H.R. 3190, p. 2.

The same limitation on the punishment of contempts is imposed by Rule 7(a) of the Federal Rules of Criminal Procedure. The Rule provides that, "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment * * *" The Rules cover criminal contempts. (See Notes of Advisory Committee on Rules to Rule 1, and Rule 42.) Although the question whether criminal contempt is a "crime" has been much debated, it is plainly an "offense." *New Orleans* v. *The Steamship Company*, 87 U. S. 387, 392. The requirement of Rule 7 is therefore applicable to contempts. Since they never have been and, under Rule 42, are not prosecuted by indictment, they may not be punished by imprisonment for more than a year.

As we have seen, there is no reported case of infamous punishment for contempt prior to 1916. The subsequent history in the state courts is illuminating. There have been only two reported cases of infamous punishment, in both of which the sentences were invalidated on appeal. *Flannagan* v. *Jepson*; *Brown* v. *State*, both *supra*. Currently, thirty-six states regulate the punishment for criminal contempt by statute. In nineteen, the maximum jail term is thirty days or less; in eight, six months or less, and in two, one year. Three states make criminal contempt punishable as a misdemeanor. Four have enacted provisions along the lines of section 401. The state statutes are summarized in Appendix B, *infra*.

We now turn to the federal authorities. Since 1916 there have been nine reported instances of infamous punishment (i.e., prison terms of more than one year). *Greekmore* v. *United States* (C. A. 8, 1916), 237 F. 743 (a year and a day); *Conley* v. *United States* (C. A. 8, 1932), 59 F. 2d 929 (two years); *Hill* v. *United States* (1937), 300 U. S. 105 (two years); *Warring* v. *Huff* (C. A. D. C., 1941), 122 F. 2d 641 (a year and a month); *United States* v. *Lederer*

(C. A. 7), 140 F. 2d 136 (a year and a day); *United States* v. *Hall* (C. A. 2, 1952), 198 F. 2d 726 (three years); *United States* v. *Thompson* (C. A. 2, 1954), 214 F. 2d 545 (four years); *Lopiparo* v. *United States* (C. A. 8, 1954), 216 F. 2d 87 (eighteen months); *United States* v. *Brown* (C. A. 2, July 10, 1957), not yet reported (fifteen months).[41]

The question of the power to impose contempt sentences of more than one year was not raised or considered in any of these cases except *Creekmore* v. *United States*.[42] The latter, decided two years after enactment of the Clayton Act, does not mention Section 24 which evidently was not called to the court's attention. And since the decision antedated the Federal Rules by many years, no consideration was given to the effect of Rule 7(a).

The court below rejected petitioners' construction of the prevailing usage clause of Section 24 of the Clayton Act. It stated (R. 77-78) that, "The 'usages now prevailing' meant practices that the courts for one reason or another thought controlling, not limitations that, so far as appears, they thought the particular occasion demanded on the merits."

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[41] In one additional case this Court vacated a contempt sentence of a year and a day. *Nilva* v. *United States*, 352 U. S. 385. In a second, a three-year sentence was reversed on appeal. *Yates* v. *United States* (C. A. 9), 227 F. 2d 844. The power of the courts to punish contempt as a felony was not considered in either case.

[42] Observations in some of the other cases to the effect that the length of a contempt sentence is discretionary are dicta. *Hill* v. *United States* decided that section 22 of the Clayton Act does not govern the sentence which may be imposed for violation of an antitrust decree entered in an action by the United States. *Warring* v. *Huff* decided that the Indeterminate Sentence Act is inapplicable to contempts. *United States* v. *Lederer* decided that where contemptuous conduct is also punishable as a crime, a contempt sentence may exceed the maximum sentence specified for the crime. The remaining cases in which the sentences were challenged held that the sentences did not violate due process or the prohibition against cruel and unusual punishment and did not constitute an abuse of discretion.

The first difficulty with this reasoning is that it accounts for a century and a quarter of uniform judicial practice as a coincidence. Surely, it is unreasonable to assume that the first one hundred and twenty-five years of our history presented no contempt case in which a court thought that sentence of more than one year was "demanded on the merits."[43] There are other and far more plausible explanations for the undeviating practice of punishing contempts as offenses not infamous.

The practice may have had its foundation in the belief that section 7 of the Judiciary Act of 1789 and its successors did not authorize infamous punishment. (See *supra*, p. 28.) Perhaps it was the product of judicial self-restraint, dictated by the summary nature of contempt procedure and the lack of a jury trial. Perhaps the constitutional question posed by the requirement that infamous crimes be prosecuted by indictment (*infra*, p. 37) lay in the background of judicial thought. It seems obvious that it was considerations like these and not, as suggested below, the lack of a "particular occasion" which underlay the practice of punishing contempts as misdemeanors.

Moreover, the court below failed to consider the purpose which animated the contempt provisions of the Clayton Act. Congress enacted them because of its recurring concern over judicial abuse and usurpation of power in contempt cases. See Frankfurter and Landis, *supra*. Section 22 modified the prior practice of punishment with respect to a specified class of contempts by limiting prison sentences to six months and fines to $1,000. As we have seen, the first clause of section 24 excluded all other classes of contempts from the provisions of

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[43] See, e.g., *United States* v. *Shipp*, 214 U. S. 386, 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a Negro prisoner in flagrant violation of its order that the custody of the prisoner remain in status quo pending review of his conviction. See also the three and six month sentences in *In re Debs*, 158 U. S. 564.

section 22. But section 24 did not stop there. Congress was evidently concerned with preventing innovations in the punishment of contempts of the excluded categories. It therefore added the prevailing usage clause to section 24, and thereby required the courts to adhere to the practice of punishing these contempts as misdemeanors and not as felonies.

The construction of the prevailing usage clause by the court below makes it a redundancy. For the court could not suggest any practice, other than the practice of punishing contempt as a misdemeanor, which the clause was designed to freeze into statutory law. The purpose of the clause could not have been to sanction the practice of trying contempts of the kind not covered by section 21 before a judge rather than a jury. That purpose was accomplished by the first clause of section 24 which makes all of the provisions of section 22 (including the provision for jury trials) inapplicable to such contempts. Hence, if the prevailing usage clause does not limit the character of prison sentences for contempts not covered by section 22, it adds nothing to the first clause of section 24. But the prevailing usage clause may not be disregarded as surplusage. *McDonald* v. *Thompson, supra.*

The court below believed (R. 78-79) that the enactment in 1954 of 18 U. S. C. 3146 fortified its construction of section 24 and made consideration of Rule 7(a) of the Criminal Rules unnecessary. Section 3146 creates the crime of bail-jumping and punishes it by a maximum sentence of five years where the accused is bailed on a felony charge and one year where the charge is a misdemeanor. The reasoning of the court seems to be that Congress would not have specified a sentence of five years for the crime if it had thought that the maximum contempt sentence for the same offense [44] was only one-fifth as long. Hence,

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[44] The statute is broader than any possible reach of the contempt power since it makes bail-jumping a crime even though no order has been entered requiring the appearance of the accused.

the Court concluded, neither section 24 nor Rule 7 could have been intended to place a one-year limitation on contempt sentences.

But obviously the terms of a statute passed in 1954 can shed no light on what Congress intended by a statute passed in 1914. Much less can they illuminate the intention of this Court when it adopted the Criminal Rules in 1944. Moreover, even if section 3146 could be said to have any relevance to the question at hand, it would point to a conclusion contrary to the one drawn by the court. For it would be more reasonable to suppose that section 3146 was enacted because Congress thought a one-year sentence inadequate for the offense and entertained doubt as to the power of the courts, in contempt proceedings, to punish it with greater severity.

We believe that we have shown, contrary to the decision below, that section 24 of the Clayton Act and Rule 7(a) of the Criminal Rules limit contempt sentences to terms of not more than a year and that the same limitation is implicit in 18 U. S. C. 401. At the very least, we have demonstrated that this conclusion is tenable. If so, it should be adopted. For a contrary conclusion would give rise to a major constitutional question and violate the principle that, if possible, statutes should be construed to avoid problems of constitutionality. *United States* v. *Rumely*, 345 U. S. 41, 45.

The constitutional question which rejection of petitioners' contention would present is whether criminal contempt is a "crime" within the meaning of the clause of the Fifth Amendment requiring infamous crimes to be prosecuted by indictment. The Court has never been confronted with this question. But in *Gompers* v. *United States*, 233 U. S. 604, 610, it declared that if criminal contempts "are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." Accordingly, many constitutional and statutory provisions for the protection of

those accused of crime have been held applicable to criminal contempts.[45] The one exception to the treatment of criminal contempts as crimes is the holding that they are not "criminal prosecutions" within the jury trial requirement of the Sixth Amendment. Although it is now recognized that this exception rests on an historical error,[46] it is perhaps too late in the day for judicial correction of the mistake.[47] But certainly the consequences of the error should not be extended to other constitutional guarantees.

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[45] The prohibition against double jeopardy; the privilege against being called as a witness; the right to a speedy trial, compulsory process and the assistance of counsel; the presumption of innocence; proof of guilt beyond a reasonable doubt; the pardon power of the President, and the statute of limitations applicable to crimes. *In re Bradley*, 318 U. S. 50; *Gompers* v. *Buck Stove and Range Company*, 221 U. S. 418; *Blackmer* v. *United States*, 284 U. S. 421; *Cooke* v. *United*, 267 U. S. 517; *Ex Parte Grossman*, 267 U. S. 87; *Gompers* v. *United States*, 233 U. S. 604.

[46] A statement in an unpublished opinion by Wilmot, J., in *Almon's Case* (1765) that it was "immemorial usage" to punish all contempts summarily. Blackstone quoted the statement, giving it currency and the stamp of authority in this country. See Fox, *The History of Contempt of Court* (1927) and Frankfurter and Landis, *supra*. As Mr. Justice Holmes has written, "it seems to be proved that in the early law they [criminal contempts] were punished only by the usual criminal procedure * * * and that at least in England it seems that they still may be and preferably are tried in that way." *Gompers* v. *United States*, *supra*, at 611.

[47] Sections 21 and 22 of the Clayton Act (18 U. S. C. 3691) rectified the error in part by requiring jury trials for certain criminal contempts. And section 152 of the Senate version of the pending Civil Rights Bill (H.R. 6127, 85th Cong., 1st Sess.) amends 18 U. S. C. 3691 to provide for jury trials of all criminal contempts involving order-disobedience not committed by an officer of the court or in the presence of the court or so near thereto as to obstruct the administration of justice.

The opinion below acknowledges that the constitutional question is not free from doubt. However, the court did not consider that fact in construing section 24 of the Clayton Act, Rule 7(a) of the Criminal Rules and 18 U. S. C. 401. It agreed that the decisions excepting criminal contempts from the jury trial requirement of the Sixth Amendment rest on "faulty history." Nevertheless, it held that contempts, if infamous crimes, need not be prosecuted by indictment because "it would be anomalous to hold that when the punishment for disobedience is more than a year, the proceeding must be by an indictment, and yet that it need not be tried to a jury." (R. 76.)

But there is no rule of construction that requires the compounding of error for the sake of being consistently wrong. Cf. *Radovich* v. *National Football League*, 352 U. S. 445. Moreover, petitioners' contention involves no anomaly. If we are right, criminal contempts are not subject to infamous punishment, may not be punished by imprisonment for more than one year, and are therefore not infamous crimes within the Amendment. Accordingly, they need not be prosecuted by indictment.[48]

The statutory limitation for which we contend on the power to punish contempts avoids the constitutional question. It equates federal practice with that which prevails in every state (see p. 33, *supra*, and App. B, *infra*). Moreover, it implements the sound democratic principle stated by Mr. Justice Field that:

> "The law of our country takes care, or should take care, that not the weight of a judge's finger

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[48] In disposing of the constitutional question, the court below also relied on the saving clause of the bail-jumping statute (18 U. S. C. 3146) that, "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt." The opinion states (R. 76-77) that this clause "was a recognition of the power as it had then developed." But the saving clause does not recognize the existence of judicial power to impose *infamous* punishment for contempt. In any event, Congressional recognition of an unconstitutional power does not make the power constitutional.

> shall fall upon anyone except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution * * *."
>
> *In re Bonner*, 151 U. S. 242, 259.

The fact that criminal contempts are punishable only as misdemeanors does not prevent the exaction of harsher penalties for contemptuous conduct of a serious nature. For Congress, of course, can make such conduct a crime. Thus, the Act of 1831 curtailing the contempt power created the crime of obstructing justice, now punishable by imprisonment for five years. See *Nye* v. *United States*, *supra*, at 46 and 18 U. S. C. 1503. And 18 U. S. C. 3146 now provides a five-year sentence for the conduct charged against petitioners.

Accordingly, the effect of sections 401, 402 and Rule 7 in equating contempts with misdemeanors for the purpose of punishment is simply to afford an accused the protections of indictment and trial by jury before he can be convicted of an infamous offense, penalized by a prolonged penitentiary sentence and subjected to the disabilities imposed upon felons.

Since petitioners' sentences were beyond the power of the trial court to impose, the sentences should be corrected by the Court or the proceedings remanded for resentencing.

IV. The Trial Court Abused Its Discretion in Sentencing Petitioners to Imprisonment for Three Years.

Except for *United States* v. *Hall* and *United States* v. *Thompson*, both *supra*, there has been no reported case of a contempt sentence in excess of two years (see *supra*, p.

33).[49] We believe that the three and four-year sentences imposed on Hall and Thompson were excessive. In any event, the present cases are distinguishable on their facts. Hall and Thompson were apprehended, while petitioners voluntarily submitted themselves to the authority of the court.

The court below held that since 18 U. S. C. 3146 fixes a maximum sentence of five years for the crime of bail jumping, a three-year sentence is not excessive for the offense when prosecuted as a contempt (R. 79).[50] The court saw no reason to hold that "the maximum punishment for the same offense should depend upon the mode of trial" (R. 78-79). We believe that the court was wrong. It is one thing to punish a man with a long penitentiary sentence which has been authorized by Congress upon conviction after indictment and trial by jury. It is quite another to impose the same sentence upon a summary conviction for contempt, even assuming that such a sentence is within the power of the court. In the latter case, the guiding principle should be exertion of "the least possible power to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231. The three-year sentences imposed here, consecutive upon five-year sentences under the Smith Act, violate that principle. For "the end proposed" was the vindication of the authority of the court, to which petitioners, albeit belatedly, had voluntarily submitted.

The Court should therefore reduce petitioners' sentences as excessive. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 304.

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[49] In the remaining cases in which sentences of more than one year were affirmed, the sentences were as follows: a year and a day (two cases); a year and a month (one case); fifteen months (one case); eighteen months (one case), and two years (two cases).

[50] The court also relied on the precedent of the *Hall* and *Thompson* cases (*ibid.*).

Conclusion

The use of the contempt power to punish the *Dennis* fugitives for absconding is without precedent in Anglo-American law. The theory of guilt upon which they were convicted is likewise unprecedented. And their sentences are of unparalleled severity. In these respects, as we have shown, the convictions and sentences are unauthorized by law and impinge on constitutionally protected rights.[51]

Accordingly, the judgments against petitioners should be reversed with directions to dismiss the proceedings or enter judgments of acquittal.

Respectfully submitted,

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320 Broadway,
New York 7, N. Y.,
Attorney for Petitioners.

---

[51] Hall has completed serving his sentences except for the period of conditional release. Thompson has been enlarged on bail in a proceeding under 28 U. S. C. 2255 pending the decision of the Court in the present cases.

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment V of the Constitution provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

18 U. S. C. 401, 62 Stat. 701, provides in part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402, 63 Stat. 90, provides:

> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.
>
> Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the

fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 7(a) of the Federal Rules of Criminal Procedure provides:

Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

APPENDIX B

Digest of State Statutes Specifying Punishment for Criminal Contempt

Maximum Penalty	*Reference*
$100 and 10 days.	13 Code 9
If the act is also a criminal offense, $1,000 and 6 months; otherwise, "in conformity to practice and usage of the common law."	27 Code 601-04
$50 and 10 days.	34 Stats. 902
$500 and 5 days.	Code Civ. Pro., 1218
No provision.	
$100 and 6 months.	Gen'l Stats., 7702, 8826
No provision.	
No provision.	
$500 and 20 days.	24 Code 2615, 3901
$500 and 5 days.	Code, 7-610
No provision.	
$500 and 3 months.	3 Stat. 906
$1,000 and 6 months.	665 Code 4
No provision.	
$30 and 30 hours where no jury.	432 R. S. 260
$100 and 10 days.	15 R. S. 12
No provision.	
No provision.	
Misdemeanor; commitment to common jail only.	274 Laws 1; 220 Laws 14
$250 and 30 days.	605 Laws 20

Appendix B

State	*Maximum Penalty*	*Reference*
Minn.	$250 and 6 months.	588 Stats. 10
Miss.	$100 and 30 days.	7 Code 1656
Mo.	Misdemeanor; $1000 and 1 year.	R. S. 476.120, 556.040, 556.460
Mont.	Misdemeanor; $500 and 6 months.	94 Code 116, 3540
Neb.	No provision.	
Nev.	$500 and 25 days.	Laws, 8950
N. H.	No provision.	
N. J.	No provision.	
N. M.	"Usage of the courts of the United States."	16 Stats. 1-2
N. Y.	Misdemeanor; $250 and 30 days.	Penal Law, 600; Judiciary Law, 751
N. C.	$250 and 30 days.	5 Gen. Stats. 4
N. D.	$250 and 30 days.	27 Code 1002
Ohio	$500 and 10 days.	Code, 12142
Okla.	Fine and imprisonment at discretion of the court.	21 Stats. 566
Ore.	$300 and 6 months.	R. S. 33.020
Pa.	Fine only when contempt not committed in open court.	17 Stats. 2042
R. I.	Fine or imprisonment or both.	Chap. 500 Gen'l Laws, Sec. 30 (1938)
S. C.	Imprisonment in penitentiary prohibited.	Constit., Art. 4, Sec. 19
S. D.	Misdemeanor; $500 and 1 year.	Code, 13.0607, 13.1235
Tenn.	$50 and 10 days.	Code, 10120

Appendix B

State	*Maximum Penalty*	*Reference*
Tex.	$100 and 3 days.	Stats., 1911
Utah	$200 and 30 days.	78 Code 32-10
Vt.	Misdemeanor.	Stats. 1274, 8615, 9966
Va.	No provision.	
Wash.	$300 and 6 months.	R. Code, 7.20.020
W. Va.	No provision.	
Wisc.	Fine and 6 months.	295 Stats. 12
Wyo.	No provision.	

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No. 100

In the Supreme Court of the United States

OCTOBER TERM, 1957

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 100

GILBERT GREEN AND HENRY WINSTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 73–79) is reported at 241 F. 2d 631. The opinion of the District Court in the *Green* case (R. 66–71) is reported at 140 F. Supp. 117.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1957 (R. 73). On February 21, 1957, an order was entered by Mr. Justice Harlan extending the time for filing a petition for a writ of certiorari to April 12, 1957. The petition was filed on April 9, 1957, and certiorari was granted on May 27, 1957 (R. 80). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

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QUESTIONS PRESENTED

1. Whether the evidence adduced at the hearings was sufficient to sustain the court's finding that petitioners knowingly and wilfully disobeyed an order of the District Court.

2. Whether petitioners' wilful disobedience of the order of the District Court, requiring them to surrender from enlargement on bail after affirmance of their convictions, constituted contempt.

3. Whether the trial court had the power to sentence petitioners to terms in excess of one year for criminal contempt.

4. Whether the trial court abused its discretion in sentencing petitioners to imprisonment for three years, where they had defied the order of the District Court by remaining fugitives from justice for more than four years.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent constitutional provisions, statutes, and rules are set forth in the Appendix, *infra,* pp. 82–88.

STATEMENT

These proceedings arose in the United States District Court for the Southern District of New York, upon the application of the United States Attorney for an order requiring the petitioners to show cause why they should not be adjudged guilty of contempt of the court for disobedience of, and resistance to, an order of that court, pursuant to the provisions of 18 U. S. C. 401 (3) (*infra,* p. 82) and Rule 42, Federal Rules of Criminal Procedure (*infra,* pp. 87–88).

Prior to the hearings under the order to show cause, petitioners were served with "Specifications of Criminal Contempt" (R. 4), which charged them with wilfully and knowingly disobeying an order of the District Court. The hearings were held on March 12 and March 26, 1956. Judge Dawson, sitting without a jury, found the petitioners guilty of contempt of court as charged, and sentenced each to three years' imprisonment (R. 38). On appeal to the Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 79), Judge Learned Hand writing the opinion for a unanimous court (R. 74).

The pertinent facts are as follows:

In 1949, petitioners and nine others—the so-called *Dennis* defendants—were convicted in the District Court of conspiracy to teach and advocate the violent overthrow of the United States Government, in violation of Sections 2 and 3 of the Smith Act (now 18 U. S. C. 2385). On October 21, 1949, petitioners were each sentenced to five years' imprisonment and to pay a fine of $10,000 (R. 44–45, G. Ex. 1). Pending appeal from these judgments of conviction, by order of the Court of Appeals for the Second Circuit dated November 2, 1949 (R. 46, G. Ex. 2), each petitioner was released on bail in the amount of $20,000 (which sums were supplied by an organization known as the Civil Rights Congress). The recognizance under which they were released was conditioned, *inter alia*, upon their surrender "in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the South-

ern District of New York may direct, if the judgment and sentence appealed from shall be affirmed" (R. 55–56, G. Ex. 3).

On August 1, 1950, the convictions were affirmed by the Second Circuit (*United States* v. *Dennis*, 183 F. 2d 201), following which the Court of Appeals entered an order revoking bail, but staying its execution for thirty days to permit an application for continued bail to be made to this Court. Subsequently, Mr. Justice Jackson continued the petitioners' bail pending their application for a writ of certiorari (*Williamson* v. *United States*, 184 F. 2d 280). Thereafter, a petition for the writ was duly filed and granted (340 U. S. 863).

On June 4, 1951, this Court affirmed the convictions (*Dennis* v. *United States*, 341 U. S. 494), and on June 22, 1951, Mr. Justice Jackson denied a requested stay of mandate (R. 8).

On Thursday, June 28, 1951, Harry Sacher, an attorney of record in the *Dennis* case, accepted service, on behalf of petitioners and the other *Dennis* defendants (R. 60), of a "Notice of Settlement" (R. 57–58) and an accompanying proposed "Order on Mandate" (R. 59–60) requiring the surrender of petitioners and their codefendants on the following Monday, July 2, 1951, to begin service of their sentences. The "Notice of Settlement" directed counsel to "[p]lease take notice that the within Order on Mandate will be presented for settlement and signature" to the District Court on July 2, 1951, at 10 a. m. (R. 57). Under the terms of the proposed "Order on Mandate," each *Dennis* defendant was directed to

"personally surrender to the United States Marshal for the Southern District of New York, in Room 318, United States Court House, Foley Square, New York, N. Y., on the 2d day of July, 1951, at 11:05 o'clock in the forenoon of that day" (R. 59–60).

On the following day, Friday, June 29, 1951, Mr. Sacher, on behalf of petitioners and the other *Dennis* defendants, requested the United States Attorney, Irving Saypol, "to allow these men to spend the last holiday, which would be available to them for some years, to being with their wives and children," and suggested to him that "it would be ironical for the United States Attorney to decline that kind of a last wish, so to speak, on the eve of Independence Day" (R. 11). This request was apparently denied (see fn. 1, *infra*). Mr. Saypol, however, according to Mr. Sacher, "suggested that we come before" District Judge Ryan about the matter (R. 11). Accordingly, Mr. Saypol and Mr. Sacher appeared before District Judge Ryan later that day (Friday, June 29, 1951), at which time Mr. Sacher made certain "motions" (R. 9), following which proceedings were continued to the following Monday, July 2, 1951.[1]

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[1] The record is not clear as to the precise nature of the "motions" which Mr. Sacher made to Judge Ryan at this session on June 29th. Presumably they dealt with his request, previously made to Mr. Saypol, that the *Dennis* defendants be permitted to spend the Independence Day holiday with their families. The transcript of record in this Court in the related case of *Hall* v. *United States*, No. 471, Oct. Term, 1952, pp. 27–28, reflects the following colloquy between Judge Ryan and Mr. Sacher (at the *Hall* contempt hearing of November 21, 1951) as to what transpired at this court session of Friday, June 29th:

"The COURT. * * * My recollection of the facts was that I

Still later on June 29th, following the proceedings before Judge Ryan, Mr. Sacher went to Communist Party Headquarters, 35 East 12th Street, New York City, where he consulted with all of the *Dennis* defendants, with the possible exception of one (Thompson) (R. 9-10). At a hearing before Judge Ryan on the following Tuesday (July 3, 1951) to ascertain the circumstances surrounding the failure of petitioners and their co-defendants, Hall and Thompson, to surrender for commitment on July 2nd (see *infra*, p. 8), Mr. Sacher testified as follows (*ibid.*):

> The COURT. Did you tell them at that time [June 29th] that their presence was required in court yesterday morning?
>
> Mr. SACHER. Definitely. As a matter of fact I advised that because I think I saw them

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think on the Friday preceding this Monday I had appeared in court; there were stenographic minutes taken at the time, and I think you were in court on that Friday afternoon.

"Mr. SACHER. I was, your Honor.

"The COURT. And I then was asked by the United States attorney to make a direction that the defendants appear at a certain time on Monday. The mandate had not as yet been received and my recollection is—the minutes will show whether I am correct or not—that I said that since the mandate had not been received and filed in this court, that I felt I was without jurisdiction to make such an order. However, I think I received some assurance from counsel that the defendants would be present in court Monday, and at that time I would hear arguments on motions which had been made with reference to the sentence imposed on one or two of these defendants."

The *Hall* transcript further reflects that Mr. Sacher, in the following language, personally assured Judge Ryan at that time that all of the *Dennis* defendants would be present in court on the following Monday (*id.*, pp. 58, 59):

"You have my word that all of these defendants will be here at that time."

among other defendants after I had been here on Friday, your Honor, and had made these motions, and therefore I advised that they all should be present and I was assured they would be.

The COURT. By them?

Mr. SACHER. Yes, by all of the defendants.

The COURT. That is, that all defendants would be here.

Mr. SACHER. That's right.

The COURT. But you don't know where they are?

Mr. SACHER. Really don't.

The COURT. And you personally told them to be here Monday and they assured you that they would be here, with the exception of the one defendant, Green?

Mr. SACHER. No, Thompson.

Mr. Isserman, the attorney for petitioner Green in the *Dennis* case, informed Judge Ryan at this same hearing on July 3rd (R. 10):

> * * * I was with Mr. Sacher on Friday when there was some discussion of the illegality or the alleged illegality of the notices that were served, and I recall Mr. Sacher saying that notwithstanding that, he would recommend strongly that all defendants be present on Monday morning, and such assurance was given. I remember, Green being my client, I remember distinctly that I saw him on that day and received from him the assurance that he would be here Monday morning.

On Monday morning, July 2, 1951, seven of the eleven *Dennis* defendants appeared in court before Judge Ryan together with government and defense

counsel, and Judge Ryan signed the above-noted (*supra*, pp. 4–5) "Order on Mandate" requiring all of the *Dennis* defendants to surrender for commitment on that day at 11:05 a. m. (R. 59–60). Petitioners, however, failed to appear as ordered by the court, either on that day (R. 12) or at any time thereafter until their surrender nearly five years later (see *infra*). As a result of their failure to appear, their bail bonds were declared forfeited (R. 12) and bench warrants were issued for their apprehension (R. 7). Attempts to execute these warrants proved of no avail, however, and petitioners remained fugitives from justice until their surrender in 1956.

On Tuesday, July 3, 1951, Judge Ryan held a hearing to inquire into the circumstances of the failure of petitioners and their co-fugitives Hall and Thompson to surrender for commitment (R. 8–11). It was at this hearing that Mr. Sacher and Mr. Isserman gave the testimony set out above.

Although diligent efforts were made to apprehend petitioners, they remained in hiding for more than four years. On February 23, 1956, petitioner Green sent a signed statement to New York newspapers, marked "For Immediate Release," announcing that he would surrender himself to commence the service of his sentence "[o]n Monday, February 27th at 12 noon" (R. 64–65, G. Ex. 9). His announcement reads in part as follows (R. 64–65):

> On Monday, February 27th at 12 noon I shall cease being a fugitive from injustice and instead become its prisoner. At that time, I shall appear at Foley Square.

> The reason I am taking this step is that the main trend of the nation is no longer toward a new world war and McCarthyism. A new trend is evident. * * *
>
> New political winds are blowing. These give hope that the curtain of fear behind which democratic liberties were undermined and destroyed will be lifted. * * *
>
> The course I chose five years ago was not dictated by personal considerations. In many ways its was harsher than that of imprisonment. It meant added hardship and suffering both for myself and my family. It entailed not only cruel separation, but the greater agony of complete severance from loved ones.
>
> And yet, so long as there was a grave danger that this country would be dragged into a senseless world slaughter and toward an American brand of fascism, it seemed incumbent upon me to resist that trend with every ounce of strength I possessed. Some could do so by going to jail; others by not.
>
> * * * * * *
>
> I enter prison with head high and conscience clear. * * *

On February 27, 1956, in accordance with his announced intention, *supra*, Green surrendered (R. 15). A filmed interview of the event was conducted by Gabe Pressman, a roving reporter for WRCA-TV (R. 19). In the course of this interview, the following colloquy occurred between Pressman and Green (R. 15–18):

> **Q. Mr. Green, can you tell us why you decided to give yourself up?**

A. Because I think the political climate in the country is changing. * * *

* * * * *

Q. Where were you during these five years?

A. I was in Peoplestown, U. S. A. Where Peoplestown is you will have to determine for yourself. It was north of the Rio Grande and south of the Canadian border.

* * * * *

I believe that was the best way to indicate to the country that it was necessary to resist the trend of McCarthyism and towards world war.

* * * * *

Q. Do you expect an additional penalty for having jumped bail?

A. You'll have to speak to Mr. Brownell on that score.

* * * * *

Q. What made you jump bail?

A. I've tried to tell you that before. I thought that was the way by which I as an individual could do my best to help the cause for peace and democracy.

* * * * *

Q. Mr. Green, do you think that it is a good policy to follow for people who feel that they have been unjustly treated in the courts to take the law into their own hands and jump bail?

A. I am not ready to generalize on that. I'd say that the best kind of policy for the nation would be to live up to its own Constitutional Bill of Rights and not to sentence men and women unjustly.

A few days later, on March 1, 1956, petitioner Winston publicly announced that he too would sur-

reader to the authorities to start service of his Smith Act sentence (R. 39-42). In a signed "Announcement" to the International News Service, marked "For Immediate Release to All Newspapers," he announced that he would surrender at the United States Marshal's Office, Foley Square, New York, "this coming Monday, March 5th, 12:30 p. m." (R. 39, 42). This "Announcement" read in part as follows (R. 40-41):

> I was compelled to ask myself, as did all Americans opposed to the stampede toward world war and McCarthyism: How could I best serve the interests of the nation and help arouse its people to fight more determinedly for the Bill of Rights against those who were spreading the false gospel of inevitable war? I chose the path I did as my method of struggle against a growing fascist menace. * * *
>
> * * * * * *
>
> Reiterating my innocence and protesting the flagrant miscarriage of justice in my case, I now enter prison * * *.

Thereafter, the instant contempt proceedings were instituted, charging petitioners with knowingly and deliberately disobeying and resisting the July 2, 1951, order of Judge Ryan requiring them to surrender to begin serving their sentences for violation of the Smith Act (R. 1). The trial court (Dawson, D. J.), in finding petitioners guilty on the basis of the above-summarized evidence, found that, with knowledge of the order of Judge Ryan, they had absented themselves, remained in hiding, and failed to surrender to the United States Marshal, and that these acts were

done deliberately and intentionally (R. 22-23). The court held that, as a matter of law, this conduct constituted criminal contempt of court, to wit, wilful disobedience of a lawful order of the court requiring petitioners to surrender to start serving their sentences (*ibid.*).

SUMMARY OF ARGUMENT

I

The evidence supports the District Court's finding that petitioners had notice of the order which they were found guilty of disobeying.

The evidence compelled the inference that petitioners well knew, on June 29, 1951, that this Court had affirmed their Smith Act convictions on June 4th, and had on June 22nd refused to stay its mandate; that the time for them to start serving their prison sentences was, accordingly, imminent; that there was then in existence, prepared for the signature of a judge of the District Court, a proposed "Order on Mandate" requiring their surrender on July 2nd; that, through their attorneys, they had been served with a "Notice of Settlement" advising that the proposed order would be presented to the District Court "for settlement and signature" at 10 a. m. on the latter date; and that the United States Attorney had refused a request, presented by Attorney Sacher, that the presentation of the proposed order to the court for signature be deferred until after the Fourth of July holiday.

The evidence further established that both petitioners assured Mr. Sacher on June 29th that they would be present in court on the morning of July 2nd.

at which time they had every reason to believe they would be forthwith ordered committed to start serving their sentences; that, notwithstanding this, they fled from justice and remained in hiding for more than four years; and that, when they finally surrendered, it was to the accompaniment of public announcements which plainly showed knowledge that they had been fugitives throughout this period. These declarations strikingly disclose that one of the purposes of petitioners in taking flight was to advertise their opposition and resistance to the court which had tried and sentenced them. If they knew, as they did, that they were fugitives, they must have known, by the same token, that their enlargement on bail had been terminated by order of the court. For, according to the terms of the recognizance, termination of bail would occur on such day as the District Court directed. Their own statements thus provide eloquent support for the conclusion that they were aware that the direction had taken place.

The authorities fully support the view that one who knows that an order is about to issue against him cannot avoid its consequences by absconding at the moment when it is about to be formally entered.

II

The District Court had the power to punish as criminal contempt petitioners' disobedience of the order requiring them to surrender for commitment.

A. Petitioners have been convicted, not of bail-jumping, but of wilful disobedience of a formal court order. Since the pertinent statutory language—de-

fining and punishing as contempt of court disobedience to a lawful "writ, process, order, rule, decree, or command" (18 U. S. C. 401 (3)) is clear on its face, there is no occasion to resort to the statute's legislative history for additional light as to its meaning. But even were it otherwise, there is nothing in that history to support petitioners' contention that the courts have no power to punish as contempt the disobedience of an order requiring a convicted defendant who has been free on bail to surrender for commitment.

The history of 18 U. S. C. 401 shows that, while it was the purpose of the Act of March 2, 1831, from which Section 401 derives, to limit the power which had been claimed by certain federal courts to punish particular types of allegedly contemptuous conduct (especially out-of-court libelous criticism of a court's opinion by a stranger to the proceedings), it has never been doubted that the direct disobedience of a court order is punishable by the court as a contempt. To the contrary, the managers of the impeachment of Judge Peck (whose sentencing of Lawless for contempt was the occasion of the enactment of the 1831 Act) expressly accepted the power of courts to enforce obedience to their own orders through the processes of contempt.

B. Nor is there any valid historical basis for carving an exception from the word "order" for cases involving disobedience of orders to surrender to judicial custody. An order to surrender is but one variety of mesne process; since early common law, acts of disobedience to such process have been punished

through contempt proceedings. Obstruction to judicial processes results from disobedience of an order to surrender no less than from disobedience of any other kind of order, *e. g.*, disobedience of a subpoena.

The dearth of reported cases of the particular type of contempt here involved has a ready explanation. The ordinary bail bond or recognizance does no more than establish the conditions upon which bail shall become forfeit. A violation of those conditions establishes basis for forfeiture of the security but will not normally provide a foundation for charging wilful disobedience of a specific order. The circumstance that violation of a specific order can be laid at the door of these petitioners may make this case unusual on its facts; it scarcely makes it unusual in principle, for the principle is one common to all cases of wilful disobedience of court orders. It cannot reasonably be contended that persons who, like petitioners, having been duly convicted of crime and having had their sentences affirmed by the highest court of the land, proceed to disobey the specific command of the trial court that they surrender for commitment, are to be deemed less contumacious, albeit they continued to flout the court's order for more than four years, than a witness who fails to answer a subpoena or a party who fails to comply with an order to produce a document.

III

The District Court had the power to sentence petitioners to terms in excess of one year.

A. The punishment provision of 18 U. S. C. 401 is not ambiguous. It confers on all federal courts the

power to punish contemptuous conduct by fine or imprisonment, the *quantum* being unlimited by any statutorily imposed maximum. The sole qualification to be implied is that the power must be exercised reasonably and not arbitrarily. This interpretation of the statute has the support of the common law and of an unbroken line of federal decisions in this country, including decisions by this Court. As Circuit Judge (later Chief Justice) Vinson observed in *Warring* v. *Huff*, 122 F. 2d 641, 642 (C. A. D. C.), "the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge."

B. Nothing in the "prevailing usage" clause of Section 24 of the Clayton Act (now 18 U. S. C. 402, par. 3) justifies placing a one-year maximum on prison sentences for criminal contempts of court.

1. The statutory context, as well as the legislative history, of the "prevailing usage" clause of Section 24 of the Clayton Act shows that its purpose was to make clear that the *procedure* for punishing contempts of types other than that defined by Section 21 (which created a special class of contempts—disobedience of court orders where the contempt is also a criminal offense under federal or state law—triable, upon the accused's demand, by jury) was to continue as in the past, *i. e.*, that such contempts were to continue to be punishable by the court without a jury. There is no basis whatever for supposing that Congress intended that the clause should have anything to do with the amount of punishment imposable for such contempts. Indeed, both the scheme and history of the law affirmatively evidence the contrary.

2. In any event, the courts did not consider themselves limited to a one-year maximum sentence in criminal cases prior to the enactment of the Clayton Act. There are at least two reported American cases, antedating the Clayton Act, in which a sentence in excess of one year was imposed for criminal contempt, and it is indisputable that there has never been a common law usage limiting sentences for criminal contempt. Moreover, none of the pre-Clayton Act decisions involving sentences of a year or less indicate that the courts thought that one year was the maximum which they might impose. On the contrary, the decisions indicate that the courts fully appreciated that there was no maximum prison sentence for contempt.

3. Furthermore, even if the "prevailing usage" clause were pertinent to the issue of the power of a court to sentence for contempt to a term longer than a year (which we dispute), the *relevant* "prevailing usage" clause would not be that of the Clayton Act's Section 24 (which was repealed when the 1948 Criminal Code was enacted into positive law), but the comparable clause of 18 U.S.C. 402, par. 3, which was enacted as positive law in 1948. By that date, there had been numerous instances of federal contempt sentences exceeding one year.

C. Rule 7 ("The Indictment and the Information") of the Federal Rules of Criminal Procedure, providing that an offense punishable for a term exceeding one year or at hard labor must be prosecuted by indictment and that any other offense may be prosecuted by indictment or information, has no application to criminal contempts; the procedure for punishing the latter

is governed exclusively by Rule 42 ("Criminal Contempt"). Hence, petitioners argument (based on Rule 7) that if contempt is punishable by imprisonment for more than one year it must be prosecuted by indictment is unsound. Indeed, on petitioners' assumption that Rule 7 is applicable, *all* contempts would have to be prosecuted by indictment or by information—a result which would leave no room for the procedures set forth in Rule 42.

D. The power to punish criminal contempt by a term of imprisonment in excess of one year does not conflict with the requirement of the Fifth Amendment that infamous crimes must be prosecuted only upon indictment by a grand jury. The premise of petitioners' argument that there is such a conflict is that contempt is a crime in the constitutional sense. If that premise be sound (which we deny), the logic of petitioners' argument carries far indeed, for, in that event, the constitutional right of trial by jury applies equally. That right does not extend to felonies alone, but to most misdemeanors as well, the only exceptions being those offenses which come within the narrow category of "petty offenses." This would mean, at a minimum, that the innumerable criminal contempt cases involving imposition of substantial fines (*e. g., United States* v. *United Mine Workers*, 330 U. S. 258) or imprisonment for more than six months (*e. g., Savin, Petitioner*, 131 U. S. 267 (one year)) were proceedings conducted in disregard of constitutional rights.

1. But petitioners' premise ignores the historically unique status of the offense of criminal contempt.

Contempts have never been classed in this country, as in the case of other types of criminal offense, as either "felonies" or "misdemeanors"; they have always been regarded as *sui generis*. "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offense have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Myers* v. *United States*, 264 U. S. 95, 104–105; *Blackmer* v. *United States*, 284 U. S. 421, 440. Accordingly, trial of contempts by the courts does not violate Article III or the Sixth Amendment, guaranteeing the right to trial by jury in all criminal prosecutions. *In re Debs*, 158 U. S. 564, 594. By the same token, a contempt is not, and has never been considered, a "crime" within the meaning of the Fifth Amendment. The necessary consequence of adopting petitioners' view would be the anomaly (as observed by Judge Hand below) that contempt proceedings, if the punishment may exceed a year's imprisonment, must be begun by a grand jury, although such proceedings need not be tried to a petit jury.

2. Nor is there basis for petitioners' claim, in the generalized form in which they state it, that the admittedly settled rule holding criminal contempts not to be "criminal prosecutions" within the jury-trial requirement of the Sixth Amendment "rests on an historical error" (Br. 38). While there is basis for saying that constructive contempts (*e. g.*, libels upon the court) committed by strangers to a proceed-

ing were not tried to the court in early (pre-eighteenth century) times, it appears that disobedience of the writs and orders of the King's courts (as, also, contempts in the face of the court and contempts by officers of the court) were punishable from early times without indictment or jury trial. The "historical error" of Mr. Justice Wilmot—that the summary punishment of all types of contempts rested upon "immemorial usage" rather than eighteenth-century English practice—was thus an error only in the generalized form in which he stated the matter. So far as contempts consisting of disobedience to court orders or processes are concerned—the type of contempt involved here—there is no basis for the suggestion that trial by the court itself, without the intervention of a jury, was an eighteenth-century innovation in English law.

Wilmot's error—his assumption that immemorial usage gave foundation for the trial of constructive contempts by the court—is not a live question in the federal courts. The Act of 1831, as interpreted in *Nye* v. *United States*, 313 U. S. 33, 49, put it beyond the judicial power to punish as a contempt an obstruction of justice taking place outside the immediate vicinity of the court. But the same Act of 1831, like its successors, fully preserves the power to punish as a contempt the disobedience of court process and orders. This power has historical support (as shown by Fox, Beale and others) not only in the eighteenth-century practice known to the framers, but also in the practice at early common law.

IV

Petitioners' sentences of three years' imprisonment were within the permissible discretion of the District Court.

After taking advantage of every procedural remedy and every avenue of appeal permitted defendants accused of crime under our laws, and after their convictions had been sustained following a full hearing by this Court, petitioners elected to take the law into their own hands and to ignore the final order that they surrender to start serving their sentences. Their conduct in absconding and in violating the order to surrender for over four years required punishment which would effectively demonstrate that such efforts to make a mockery of the judicial process would not be tolerated.

Considering the flagrancy of the contempt, the protracted period during which it continued and the fact that, even on the eve of surrender, petitioners chose to renew their attacks on the courts which had convicted them, it must be concluded that the offenses were grave and that there were no mitigating circumstances.

Today, by statute, petitioners would be punishable for such an offense as they committed by five years' imprisonment or a $5,000 fine, or both. The penalty imposed here can thus hardly be deemed excessive under these statutory standards.

ARGUMENT

I

THE EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT PETITIONERS HAD NOTICE OF THE ORDER WHICH THEY WERE FOUND GUILTY OF DISOBEYING

Petitioners urge (Br. 12–21) that their convictions cannot be sustained because there is no evidence that they "had knowledge of the existence of the order which they were convicted of 'knowingly disobeying'" (Br. 12). We submit, however, that the evidence adduced before Judge Dawson fully warranted the inference which he drew (R. 42, 67): that both petitioners were well aware of the existence of the order in question.

From the evidence, as summarized *supra*, pp. 3–11, and taking into consideration that petitioners, during the period immediately prior to their scheduled appearance in court on July 2, 1951, were being kept advised of developments in their case by the *Dennis* attorneys, Messrs. Sacher and Isserman (*supra*, pp. 6–7), Judge Dawson was warranted in concluding that petitioners, on Friday, June 29, 1951, were well aware of the following facts: (1) that this Court had, on June 4th, affirmed their Smith Act convictions, and on June 22nd refused to stay its mandate, so that the time for them to start serving their prison sentences was imminent (*supra*, p. 4); (2) that there was then in existence, prepared for the signature of a judge of the District Court, a proposed "Order on Mandate," requiring their surrender to the United States Marshal, in Room 318 of the United States Court House at Foley Square, New York, on Monday, July 2, 1951

(*supra*, pp. 4–5); (3) that they, through their attorneys, had been served with a "Notice of Settlement" advising that this proposed "Order on Mandate" would be presented to the District Court "for settlement and signature" on that date, at 10 o'clock in the morning (*supra*, p. 4); and (4) that Mr. Sacher's request to the United States Attorney, Mr. Saypol, that he defer moving the court to enter its "Order on Mandate" until after the Fourth of July holiday, had been refused (*supra*, p. 5).

The evidence also established that on June 29th, following his appearances before Judge Ryan, Mr. Sacher "[d]efinitely" told petitioners that "their presence was required in court" on the morning of July 2nd; that both assured Mr. Sacher that they would be present in court at that time; and that Green, in addition, following "some discussion of the illegality or the alleged illegality of the notices [*i. e.*, the "Notice of Settlement"; see *supra*, p. 4] that were served," personally assured Mr. Isserman, his personal attorney, that he would be present in court at that time (*supra*, pp. 6–7). The evidence further established that, notwithstanding these personal assurances and their knowledge that they were required to be present in court on the morning of July 2nd, at which time they had every reason to believe they would be ordered committed to commence service of their sentences, they did not appear on that day or at any time thereafter prior to their surrender more than four years later (*supra*, pp. 7–8); and that, when they finally did surrender, it was to the accompaniment of public announcements which plainly showed knowledge that

for the preceding four years they had been fugitives from justice (*supra*, pp. 8–11). Petitioner's declarations were unquestionably admissible as admissions against interest. On their face, these declarations strikingly disclose that one of petitioner's purposes in taking flight was to advertise their opposition and resistance to the court which had tried and sentenced them. If petitioners knew that they were fugitives—which they are in no position to deny—they must have known, by the same token, that their enlargement on bail had been terminated by order of the court.[2] For, according to the terms of the recognizance (*supra*, pp. 3–4), termination of bail would occur on such day as the District Court directed. Petitioners' own statements thus provide eloquent support for the conclusion that they were aware that the direction had taken place.

The above-summarized evidence, which petitioners made no effort to challenge or explain, compels the conclusion that petitioners knew, at some point during the prolonged period that they were in hiding, if not on the very day of July 2, 1951, that the order which they had every reason in the world to expect had in fact issued.[2] That knowledge, coupled with the admitted fact of their four years' flight from justice, fully sufficed to support the finding of guilt.

[2] This Court may judicially note that the newspapers of the nation gave prominent notice to the absconding of petitioners and the court proceedings of July 2nd, including Judge Ryan's signing of the order on that date requiring petitioners' surrender. See, *e. g.*, the *New York Times* of July 3, 1951, p. 1, col. 1, and the *Daily Worker* of the same date, p. 1.

2 Daniell, *Chancery Pleading and Practice* (4th Amer. ed., 1871), p. 1684, which petitioners cite as an authority in their favor (Br. 17), is actually against them. "In some cases," according to this writer, "a committal may be ordered, where neither the writ [of injunction] nor the minutes of the order have been served, nor any personal notice given. Thus, it was held by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice; *and if the party remains in Court, until the order is about to be made, he cannot, by leaving at that instant, avoid its consequences*" (emphasis added). Although the instant case involves an order rather than an injunction, the thrust of the passage is no less plain. Petitioners, in the days immediately preceding July 2, 1951, did not merely have a growing suspicion or fear that an order directing them to go to prison might issue against them. This Court having already affirmed their convictions and refused a stay of mandate, they *knew* that the order for their commitment was both certain and imminent. Accordingly, they could not, by taking flight on the eve of the entry of that order, "avoid its consequences."

See, also, the comment following immediately after the above-quoted passage (2 Daniell, *loc. cit.*, pp. 1684-1685):

"* * * So, also, if he is informed that the injunction has been granted, and there will be no delay on the part of the [plaintiff] in order to get the order drawn up, the defendant will be committed for the breach of it; because it would be a contempt to act contrary to the [intended] order, when he knew the order was made. In this and the like cases, if the mischief

To the same effect as the above-quoted passage from Daniell (*supra*, p. 25), see 2 High, *Injunctions* (4th ed., 1905), §§ 1422-1423; *Skip* v. *Harwood*, 3 Atk. 564, 26 Eng. Reprint 1125 (Chancery, 1747); *Anon.*, 3 Atk. 567, 26 Eng. Reprint 1127 (Chancery, 1747); *Hearn* v. *Tennant*, 14 Ves. Jun. 136; 33 Eng. Reprint 473 (Chancery, 1807). In *M'Neil* v. *Garratt*, Cr. & Ph. 98, 41 Eng. Reprint 427 (Chancery, 1841), it was held that a person may be imprisoned for breach of an injunction even before the injunction issues, so long as he knows it is *going to* issue by virtue of his knowledge of the order for its issuance. This is also the rule in the United States: *Winslow* v. *Nayson*, 113 Mass. 411, 420; *Haring* v. *Kauffman*, 13 N. J. Eq. 397, 399; *Hutchins* v. *Munn*, 28 App. D. C. 271.

In *Pettibone* v. *United States*, 148 U. S. 197, this Court observed (at 206-207):

> In matters of contempt, persons are not held liable for the breach of a restraining order or injunction, unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued, or the order entered, *or at least that application is to be made*; but without service of process *or knowledge or notice or information of the pendency of*

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might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees * * *. *In short, the Court will not, under such circumstances, permit a man to elude its justice by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt* * * *." [Emphasis added.]

proceedings, a violation cannot be made out. [Emphasis added.]

Here, as we have seen, petitioners knew far more than that an application was to be made for an order for their commitment, and had far more than "information of the pendency" of proceedings looking to their commitment. They knew, on June 29, 1951, that the entry of such an order was, as we have said, both certain and imminent. See also *In re Lennon*, 166 U. S. 548, 554; *Radio Corp. v. Cable Radio Tube Corp.*, 66 F. 2d 778 (C. A. 2), certiorari denied, 290 U. S. 703.

In short, we submit that there was compelling evidence that petitioners knew of the existence of the order for their surrender, and that their flight from justice reflected a design to flout it. The Court of Appeals correctly summed it up in the *Hall* case, *supra*, 198 F. 2d at 730-731, decided on almost identical facts:

> On this record, therefore, we think the court was eminently justified in finding as a fact that respondent had complete notice of the order and willfully disobeyed it. The inference not only was well within the area permitted to a trier of facts, but was indeed one highly reasonable if not compelled. However heavy the evidential burden on the prosecution here, it can hardly be held more exacting than the "proof beyond a reasonable doubt" of an ordinary criminal case before a jury. We have been often pressed, but have consistently refused, to apply this formula to each link in the chain of alleged events in order that if as to any [illegible]

> proof is not thus overwhelming there must be a reversal of a verdict of guilt. Instead we have said that the process of drawing inferences is to be governed, as ordinarily, by human experience, that indeed no other rule of jury fact finding has a claim to reality, and that the strict requirement as to burden of proof constitutes an over-all admonition or warning, rather than a precise yardstick to be applied to each isolable segment of the proof. [Citing cases.] There can be little doubt but that a jury would have been permitted to make the rational inference made below. We think that a court must not be restricted beyond a jury or compelled to remain blind to so clearly intentional a flouting of its command as was here shown.

II

THE DISTRICT COURT HAS THE POWER TO PUNISH AS CRIMINAL CONTEMPT PETITIONERS' DISOBEDIENCE OF THE ORDER REQUIRING THEM TO SURRENDER FOR COMMITMENT

Petitioners contend that at common law and under Section 17 of the Judiciary Act of 1789, 1 Stat. 83, courts were without power to punish through contempt proceedings the disobedience of orders requiring convicted defendants to surrender for commitment, and that therefore they are without power to do so under 18 U. S. C. 401, the lineal descendant of that section of the first Judiciary Act (Br. 21-26). We submit that the argument is without merit.

A. Petitioners have been convicted, not for "libel, summary" but for wilful disobedience of a formal court order; 18 U. S. C. 401 (3), like its predecessors,

includes within the definition of contempt of court "Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." Since this language is clear on its face, there is little occasion to resort to the section's legislative history for additional light as to its meaning. *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), certiorari denied, 345 U. S. 925; see *Kaiser* v. *Irving Trust Co.*, 299 U. S. 115; *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85. The case at bar is thus completely distinguishable from *Nye* v. *United States*, 313 U. S. 33, which involved the interpretation of an ill-defined and inherently ambiguous clause of the statute, [illegible] "Misbehavior of any person in its [illegible] or so near thereto as to obstruct the administration of justice." In *Nye*, the Court relied upon previous construction of that clause, adopted in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402. Holding that the word "near" connoted actual geographic proximity, not proximate causation, the Court overruled its *Toledo Newspaper* decision to the extent that the latter had construed the term differently. In so doing it relied on the clause's legislative history. But here, as we have said, there is no ambiguity in the pertinent clause.

But even if the term "order" were sufficiently ambiguous to call for consideration of the legislative history of the clause in question, there is nothing in that history which supports petitioners' argument. The Act of March 2, 1831 (4 Stat. 487), from which 18 U. S. C. 401 is derived (*Nye* v. *United States*, *supra*, 313 U. S. at 45), itself states that it is "declara-

[illegible] the Act of 1831 was put as declaratory [illegible] because to Buchanan and the proponents of the measure that Act was merely an affirmation of existing law.

[illegible] Congress intended thereby to limit the power which had been claimed by certain federal courts to punish for contempt. The event which immediately necessitated it was the unsuccessful attempt to impeach Judge James H. Peck for imprisoning and disbarring one Lawless for publishing an allegedly libelous criticism of one of his opinions while an appeal therefrom was pending. See Frankfurter and Landis, *op. cit. supra*, 37 Harv. L. Rev. at 1024-37. It was in the light of this history that this Court, in *Nye*, stated that (313 U. S. at 45):

> "... the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789.

But, in the light of this history, what *Anderson* referred to was a "drastic delimitation" of the "undefined power" of the federal courts over acts of alleged contempt which did not constitute direct disobedience of a court order and were not committed in the presence of the court. While this Court has continued in subsequent cases to construe narrowly the 1831 Act and its present day successor, 18 U. S. C. 401 (in deciding, for example, that perjury in and of itself does not constitute contempt (*In the Matter of Michael*, 326 U. S. 224, 227), and that a lawyer is not an "officer of the court" within the meaning of the second clause of 18 U. S. C. 401 (*see supra*, p. 32) (*Gompers v. United States*, 350 U. S. 399); the Court has never narrowly construed the clause referring to "disobedience of writs, processes, orders, rules, decrees or commands of the courts, or given that clause any meaning other than that which its plain terms compel.

There is no indication either in the language of the 1831 Act, or in its legislative history that it was intended to restrict the ancient and settled power of the courts to punish as for contempt the direct disobedience of their orders. On the contrary, the managers of the impeachment of Judge Peck indicated that they accepted the power of the courts to punish the contemptuous refusal to obey their own orders. George McDuffie, in discussing the criterion for measuring the power of the courts to punish contempts summarily, argued (Stansbury, *Report of the Trial of James H. Peck*, p. 87) that punishment for contempt was within the power of the court only in

> . . . a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstructed. It will not do to rely upon a mere constructive interference, impeding the course of justice, by some far fetched implication.

Another manager, Henry R. Storrs, explicitly agreed with Blackstone that disobedience of orders of the court justified punishment for contempt. *Id.*, p. 396. Storrs went on to quote an eighteenth century letter written by Lord Erskine which stated (*id.*, p. 398):

> Every court must have power to enforce its own process and to vindicate contempts of its *authority*; otherwise the *laws would be despised*, and *this* obvious *necessity* at once produces and limits the *process* of attachment. [Emphasis in original.]
>
> Whenever any act is done by a court, which the subject is bound to obey, obedience may be enforced and disobedience punished by that summary proceeding.

And James Buchanan, in summing up for the managers, conceded that (*id.*, p. 436):

> . . . by its very organization, every court of justice is clothed with the power of imposing silence, r[es]pect and decorum in its presence, and enforcing obedience to all its lawful commands.

There can be no question of the historical basis of the views expressed by Buchanan and the other architects of the 1831 Act. "From the earliest times a refusal to obey an order of the king or of his officer, formally and expressly directed to a subject, has been

regarded as a contempt.'" Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 164. As Fox points out, the invocation of the contempt power to punish "disobedience to the commands of the King and his courts as well as other acts which tend to obstruct the course of justice" had become established by the fourteenth century. Fox, *The Nature of Contempt of Court*, 37 Law Q. Rev. 191, 201 (1921).

B. Petitioners, however, would carve an exception from the word "order" for cases involving disobedience of orders to surrender to judicial custody. Their argument (Br. 21 *et seq.*) is that there is no history to show that this particular type of disobedience had been punished as a contempt. As was pointed out by Judge Biggs, concurring in part and dissenting in

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'The passage in Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 164, to which the Court refers, follows:

> This, doubtless, was deemed a breach of allegiance. "*Contemptus breciatio*" was declared by the laws of Henry I to be an offense subjecting a person guilty of it to amercement. In the time of Henry II it was laid down that if a tenant duly summoned in the court was absent, the king or his justices might at their pleasure punish him for his contempt of court. So again, if the demandant in certain cases failed to produce his lord in court, "the body of the demandant himself should be attached on account of his contempt of court, and thus he shall be destrained to appear in court." This was equally true in the inferior courts. Thus it was a contempt of the lord of a manorial court for a person owing allegiance to the court to depart from it without answering a complaint. And similarly a burgess was guilty of contempt in failing to appear at the proper time before the borough court. Among the acts of contempt of the Vice's court was contempt "*in non parendo mandatis*." And further, as we have seen, it was contempt of the admiral's court to refuse to sue a matter that came in that court. [Citations omitted.]

part in *United States* v. *Hall*, *supra*, 198 F. 2d at 734, that case was probably the first of its exact kind decided by the courts. *Hall* and the subsequent case of *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841, both of which involved the same legal questions here in issue, are the only decisions precisely in point.[5] In cases involving violations of the conditions of bail, however, it has certainly been suggested that disobedience of a specific court order to appear would be an act of contempt. Thus, in *In re Dill*, 32 Kan. 668, 689–690, 5 Pac. 39, 47–48, the Kansas Supreme Court stated:

> To constitute a direct contempt of court there must be some disobedience to its order, judgment, or process. * * *.
>
> * * * * *
>
> The petitioner violated no order, direction, or judgment of the court, nor was he at large by direction or order of the court. He had entered into a recognizance, as the statute permitted him to do, by which he bound himself to the state to appear in court at the time and term of the court stated in the recognizance, and submit to a trial of the criminal charges therein pending against him. * * * The extent of his offending was in not appearing in court and submitting to the trial as he had bound himself to do by the recognizance, and absenting himself from the county where the court was held.

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[5] In *In re Kessler*, 32 Kan. 693, 5 Pac. 30, and *State* v. *Jordy*, 161 La. 104, 108 So. 229, the courts similarly refused to punish for contempt in situations in which the recognizance or bond was not accompanied by a specific order to appear. See, also, *United States* v. *Hall*, *supra*, 198 F. 2d at 729.

Even if the contumacious conduct here involved were novel or unusual, it would still be covered by the plain terms of the pertinent clause of the contempt statute, 18 U. S. C. 401 (3). But the conduct, we submit, is hardly so novel that it can be said that the applicability of the statute presents a new question. An order to surrender is but one variety of mesne process, acts of disobedience of which have always been punished through contempt proceedings. *E. g.*, *In re Rice*, 181 Fed. 217, 221 (C. C., M. D. Ala.) (evasion of service); *The P. I. Nevius*, 48 Fed. 927 (S. D. N. Y.) (resistance to and evasion of process of attachment); *Shotkin* v. *Atchison, T. & S. F. R. Co.*, 124 Colo. 141, 235 P. 2d 990, certiorari denied, 343 U. S. 906 (failure to appear in court in disobedience of summons); *Conneral* v. *City of Atlanta*, 7 Ga. App. 589, 67 S. E. 691 (same); *Aarons* v. *State*, 105 Miss. 402, 62 So. 419 (absconding despite knowledge of subpoena to appear as witness in criminal proceeding). And see the excerpt from Beale, *op. cit.*, note 4, *supra*, p. 33. All such cases involve acts of disobedience of various court orders to appear—orders which are not significantly different from an order to surrender. There is no valid reason why orders requiring defendants free on bail to surrender for commitment should be distinguished from the many other similar kinds of court orders (see the cases cited *supra*) enforcible through contempt proceedings. See, also, *infra*, pp. 70–76.

The purpose of punishing disobedience of court orders by contempt proceedings is to prevent obstruction of judicial processes. Such obstruction results

from disobedience of an order to surrender no less than from disobedience of any other kind of order, *e. g.*, disobedience of a subpoena. The District Court in the *Hall* case, in holding that the power of a court to punish disobedience of an order to surrender is essential to protect judicial processes, made these cogent observations (*United States* v. *Hall*, 101 F. Supp. 666, 672 (S. D. N. Y.), affirmed, 198 F. 2d 726, certiorari denied, 345 U. S. 905):

> That forfeiture of the bond does not always accomplish obedience to these orders is established by the facts now before us. Without power in the court to punish for wilful disobedience of these orders the only means remaining for securing fulfilment of the obligation to observe the terms of the bail would be rendered ineffectual. The judicial process must have inherent within it the power to punish wilful disobedience of orders directed to a defendant who has been released on bail. Any other rule would permit a defendant to avoid standing trial or submitting to sentence imposed following conviction, with the knowledge that the sole penalty would be forfeiture of bail—a matter of convenience to a person of means and a matter of indifference when bail has been posted by others.

The dearth of reported cases of the particular type here involved has a ready explanation. The ordinary bail bond or recognizance does no more than establish the conditions upon which bail shall become forfeit; it is akin to a pledge or contract of surety.[*] 6 Am.

[*] Historically, it was conceived that a person was in the custody of his bail, rather than of the sheriff. 4 Holdsworth, *History of English Law*, pp. 525–526.

Jur., *Bail and Recognizance*, §§ 2, 3, 6, 118, 135. A violation of the conditions establishes basis for forfeiture of the security but will not normally provide a foundation for charging willful disobedience of a specific order. And it is obvious that in most instances of flight the act of absconding will have taken place before the court has had any occasion to fix a specific time and place for appearance. The circumstance that violation of a specific order can be laid at the door of these petitioners may make this case unusual on its facts; it scarcely makes it unusual in principle, for the principle is one common to all cases of willful disobedience of court orders.[7]

It may also be observed that when flight takes place before trial,[8] the court, as a practical matter, will ordinarily be in a position to impose a sanction (other than forfeiture of bail) upon the apprehended fugitive. For, if he is convicted, the court will be entitled

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[7] The uncommonness of contempt cases involving bail jumpers does not, of course, suggest that absconding was lightly regarded at common law. A person under indictment who took flight was subject to the baneful sanctions of outlawry, described by Pollock and Maitland (*History of English Law* (1895), v. II, p. 447) as "an engine for compelling the contumacious to abide the judgment of the courts." And see *id.*, v. II, pp. 578–579; v. I, pp. 160–161. The process of outlawry as a method of dealing with the absconder from justice was imported into this country (*Respublica* v. *Doan*, 1 Dall. 86 (Pa. Sup. Ct., 1784); *Dale County* v. *Gunter*, 46 Ala. 118), although it fell into disuse (as it did also in England) in the nineteenth century. As late as 1860, the State of Pennsylvania adopted an outlawry statute. 19 Purdon's Penna. Stats. Ann., Sec. 1221.

[8] Bail after conviction became known only in relatively recent times. See *Rex* v. *Wilkes*, 4 Burr. 2527, 2542, 98 Eng. Reprint 327 (K. B., 1770); *Rex* v. *Brooke*, 2 Term Rep. 190, 194, 100 Eng. Reprint 103, 105 (K. B., 1788).

to take his past conduct into account in exercising its discretionary sentencing powers. Certainly, we see no valid reason why flight from a court's authority (whether pre-conviction or post-conviction flight) may not be punished as a contempt in any case in which the exact terms of the contempt statute are met, *i. e.*, when it appears that the flight constituted a knowing violation of a specific order of the court. Considering the instant case, can it be said that petitioners—persons who had been duly convicted of crime, had had their sentences affirmed by the highest court of the land, and had been directed to surrender for commitment—are to be deemed less contumacious, albeit they continued to flout the court's order for more than four years, than, let us say, a witness who fails to answer a subpoena or a party who fails to comply with an order to produce a document? The suggestion makes neither good sense nor good history.

The enactment of the so-called bail-jumping statute (18 U. S. C. 3146; *see infra*, pp. 83–84) provides the courts with additional means to vindicate their authority. But at the time of the contumacious action here in question, punishment for contempt was the sole means by which the District Court could do so. Moreover, Congress, in providing the new remedy, implicitly recognized the power of the courts to punish the act of absconding as an act of contempt where the refusal of the defendant to surrender involves also the disobedience of a specific order. For the statute expressly provides that "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its powers to punish for contempt."

III

THE DISTRICT COURT HAD THE POWER TO SENTENCE PETITIONERS TO TERMS IN EXCESS OF ONE YEAR

Petitioners contend (Pet. 5–16; Br. 26–40) that "[t]he trial court was without power to sentence petitioners to terms in excess of one year" (Pet. 5; Br. 26). They base this on (a) an alleged ambiguity in the punishment provision of 18 U. S. C. 401 (Pet. 12; Br. 28–29); (b) Section 24 of the Clayton Act (Pet. 6–14; Br. 30–37); (c) Rule 7 (a) of the Federal Rules of Criminal Procedure (Pet. 9–10; Br. 33); and (d) the Fifth Amendment's prohibition against holding any person to answer for a capital or otherwise infamous crime other than by indictment by a grand jury (Pet. 14–16; Br. 37–39). We consider these contentions in sequence.

A. THE PUNISHMENT PROVISION OF 18 U. S. C. 401 IS NOT AMBIGUOUS; IT CONFERS ON ALL FEDERAL COURTS AN UNLIMITED POWER TO PUNISH CONTEMPTUOUS CONDUCT BY FINE OR IMPRISONMENT. THE ONLY QUALIFICATION IS THAT THE POWER MUST BE EXERCISED REASONABLY AND NOT ARBITRARILY

Petitioners contend (Br. 28–29) that the punishment provision of 18 U. S. C. 401 is ambiguous, and then proceed to argue from this premise that the District Court's power to sentence them to imprisonment was limited to the imposition of a maximum term of one year. The argument runs as follows: The words "shall have power to punish by fine or imprisonment, at its discretion" could mean either (1) that the court has discretion to impose either the one or the other form of punishment (but not unlimited

discretion as to the *quantum* of the punishment), or (2) that the *amount* of punishment (in whichever form imposed) is in the discretion of the court; the former of those two meanings is more favorable to accused persons; therefore, under the principle requiring strict construction of penal statutes, the former meaning is to be adopted. The consequence of this would be, they argue, that the District Court in this case did not have unlimited discretion with respect to the duration of the prison term which it imposed (as the Government contends, subject, always, of course, to the rule of reason, *i. e.*, that the discretion be exercised in a non-arbitrary manner), but a limited discretion with regard to such duration (not more than one year, as they elsewhere argue).

We submit that this argument is without substance because the punishment provision of 18 U. S. C. 401 is unambiguous[10] and fully supports the Government's contention as to its meaning. The words "shall have power to punish by fine or imprisonment, at its discretion" have been a part of the statute providing for the punishment of contempt of court since the first congressional enactment providing for the establishment of the federal judiciary. Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, provided, in language substantially identical with the foregoing language, that

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[9] Elsewhere petitioners argue that, *if* the court selects imprisonment as the punishment to be imposed, the maximum term imposable is one year. See *infra*, pp. 44–76.

[10] The rule of strict construction has, of course, no applicability where the words are unambiguous. "Where there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96.

the courts of the United States "shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *." This provision was merely the expression by Congress of the accepted common law view as to the power of a court to punish contempt. "In the case of almost every other offence punishable by fine or imprisonment, a limit to the punishment is fixed by Act of Parliament; in all cases of contempt, on the other hand, there is considered to be an unlimited power in the court to inflict imprisonment and, in the case of contempt of a criminal nature, to impose a fine as well, and that also without limit." Fox, *Eccentricities of the Law of Contempt of Court*, 36 Law Q. Rev. 394, 398. Thus, when the words "at its discretion" are given their normal meaning, and particularly when they are read in the light of the common law, it is clear that what is meant is that the court has the power to impose a fine or a prison term which, in the opinion of the court, will be commensurate with the gravity of the act of disobedience or other contempt involved.[11]

[11] It is true, as petitioners suggest (Br. 27), that in England contempts are punishable as are common law misdemeanors. But that does not advance their argument. "[F]or common law misdemeanours, that is to say, any offences for which a statute has not prescribed any particular period of imprisonment, the law is, and always has been, that the court can pass a sentence of imprisonment and impose a fine at its discretion, provided that it does not impose an inordinate sentence." *Rex* v. *Marcus*, 2 All E. R. 965, 967 (K. B., 1950), 115 J. P. 5 (sentence of four years imprisonment for the common law misdemeanor of conspiracy to evade customs duties).

The function of the term "at its discretion" in Section 401 is to tell the court what penalty can be imposed by it. When the words "fine" and "imprisonment" appear in the penal provision of a statute, the questions that automatically arise are: "How much fine"? and "How long a term of imprisonment"? These questions are usually answered by the inclusion in the statute of a maximum fine and a maximum number of months or years of imprisonment.[12] Section 401 is noteworthy for its very lack of maximum figures. The questions are answered by the words "at its discretion." The statute thus in no way limits the length of sentence or the amount of fine which may be imposed on a contemnor.

The above reading of the statute is buttressed by the case of *In re Bradley*, 318 U. S. 50, where it was held that a person convicted of contempt of court may be punished by a fine or imprisonment but not both. To give the statute a meaning other than that contended for here would make the phrase "at its discretion" completely superfluous, since the word "or" clearly requires that the punishment imposed be in the alternative. There is no reason to suppose that Con-

[12] There are numerous statutes which provide a maximum penalty for contempts arising under certain specific situations. A maximum fine of $1,000 and imprisonment for not more than one year may be imposed by a court where a party is in contempt of, or refuses to appear before, the Securities and Exchange Commission. 15 U. S. C. 78u, 48 Stat. 900. A party in contempt of the Federal Communications Commission is subject to a fine ranging from $100 to $5,000 and imprisonment for not more than one year. 47 U. S. C. 409m, 48 Stat. 1097-1098. Cf. 2 U. S. C. 192, the so-called "contempt of Congress" statute ("a fine of not more than $1,000 nor less than $100 and imprisonment * * * for not less than one month nor more than twelve months").

press intended the phrase to be a mere redundancy, particularly in view of the fact that the statute names no maximum figures. The phrase, as Judge Hand pointed out in the opinion below, means that the "term of imprisonment is to be as much in the court's discretion as the fine" (R. 78).* Very heavy fines have been levied to punish a party who has refused to obey an order of the court. This Court enforced a fine of $700,000 in *United States* v. *United Mine Workers*, 330 U. S. 258. A fine of $1,400,000 against a union and a fine of $20,000 against an individual defendant were deemed to be within the proper discretion of a trial court in *International Union, United Mine Workers of America* v. *United States*, 177 F. 2d 29 (C. A. D. C.), certiorari denied, 338 U. S. 871. It would obviously give the statute a strained meaning to hold that there is this tremendous latitude given the court when it sees fit to impose a fine but that one year is the maximum term of imprisonment. Such a construction should be rejected as not within the language or intent of Congress. The purpose of the contempt power is to maintain and vindicate the authority of the federal courts. The court should consequently be permitted to protect itself and its functions to the degree required by the seriousness of the contempt committed (*Ex parte Grossman*, 267 U. S. 87, 117), subject, of course, to the qualification that the power must not be exercised arbitrarily, *United States* v. *United Mine Workers*, *supra*, 330 U. S. at 304–305.

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* To the same effect see Note, *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L. J. 83, 99; Thomas, *Problems of Contempt of Court* (1934), p. 10.

A long line of federal decisions has recognized that, under Section 401 and its predecessors, a court has just such unlimited power to sentence for contempt. For example, in *Warring* v. *Huff*, 122 F. 2d 641, 642 (C. A. D. C.), the court, speaking through Circuit Judge (later Chief Justice) Vinson, observed that "the contempt statute sets no maximum, not even an indefinite one such as life; the maximum is the non-arbitrary discretion of the trial judge." Again, in *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136, 139 (C. A. 7), certiorari denied, 322 U. S. 734, the court ruled that punishment in a contempt proceeding "rests solely in the sound discretion of the court, subject only to the Constitutional privilege against cruel and unusual punishment." In both the *Warring* and *Lederer* cases, the sentence imposed exceeded one year.

B. NOTHING IN THE "PREVAILING USAGE" CLAUSE OF SECTION 24 OF THE CLAYTON ACT JUSTIFIES PLACING A ONE-YEAR MAXIMUM ON PRISON SENTENCES FOR CRIMINAL CONTEMPTS OF COURT

Petitioners' argument, insofar as it rests on the "prevailing usage" clause of Section 24 of the Clayton Act of 1914 (see *infra*, p. 86), runs as follows (Br. 30):

"Sections 21 and 22 of the Clayton Act relate to contempts for disobedience of court orders where the contemptuous conduct is a criminal offense under federal or state law. Section 22 requires contempts of this character to be tried by a jury and fixes the maximum punishment at imprisonment for six months and

a fine (payable to the United States) of $1,000. Section 24 of the same Act provides that

> * * * nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, *but the same, and all other cases of contempt not specifically embraced within section twenty one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.* [Italics added.][1]

"Section 24," petitioners' argument continues (Br. 30), "accomplishes two purposes. By its first clause, it excludes certain kinds of contempt (including the kind involved here) from the jury trial requirement and limitation on punishment contained in Section 22. By its second clause (italicized above), it limits the punishment for contempts of the excluded categories to that which prevailed on October 15, 1914, the date of enactment of the Act." In other words (petitioners argue), "the punishment for contempts of the classes described in Section 24 must be determined by reference to the usage which prevailed in 1914" (Br. 31). But, say petitioners, there is "no reported case, federal or state," prior to 1914, "of a sentence in excess of one year * * * for contempt" (Br. 29).[2] Hence,

[1] The substance of Sections 21, 22 and 24 of the Clayton Act is now contained in 18 U. S. C. 402 and 3691. See *infra*, pp. 82-83.

[2] While this statement is not strictly accurate (see *infra*, p. 54), it may be accepted as true for present purposes.

they conclude, it was the intent of Congress, by the "prevailing usage" clause of section 24 of the Clayton Act," to "codify this century and a quarter of undeviating American practice and make it applicable to the classes of contempts to which the maximum sentence of six months provided by section 22 does not apply" (Pet. 8; Br. 30). In other words, it is said, it was the intent of Congress to "[freeze] into statutory law by Section 24 of the Clayton Act" (Br. 30) a one-year maximum prison sentence for all contempts other than the particular kind of contempt which Section 21 of the Clayton Act defined (with respect to which Section 22 of the Act imposed a maximum sentence of six months' imprisonment and a $1,000 fine).

Petitioners must surely agree that this was a singularly vague and circuitous way for Congress to fix a statutory maximum on prison sentences which might generally be imposed for criminal contempt. Congress knows how to establish maximum penalties for criminal offenses, as a glance at the Criminal Code will show. Indeed, in Section 22 of this very Clayton Act (see *supra*, pp. 44-45), Congress had just fixed such a statutory maximum—a fine of $1,000, or six months' imprisonment, or both—for the special type of contempt defined by Section 21, *viz.*, disobedience of a federal court order where the contemptuous conduct is also a criminal offense under state or federal law. It strains too far to suppose that Congress, in Section 24, was attempting to set a statutory maximum for all other types of contempt in such strangely circumlocutionary language as petitioners' argument would

require us to believe. Moreover, there is not a syllable of legislative history to support that argument. On the contrary, as we shall show, both the context and the legislative history of Section 24 demonstrate that Congress never entertained the notion that the "prevailing usage" clause of Section 24 (now contained in the 3d paragraph of 18 U. S. C. 402) had any bearing on the penalties for contempt. As we shall also point out, there are still other objections to petitioners' theory.

I. The statutory context, as well as the legislative history, of the "prevailing usage" clause of Section 24 of the Clayton Act shows that its purpose was merely to make it so that the procedure for punishing contempts of types other than that defined by Section 21 was to continue as in the past.

(a) *Context.*—Sections 21-25 of the Clayton Act (38 Stat. 738-740) formed an integral unit having no particular connection with the rest of the Act.

Section 21 provided that any person who should willfully disobey "any lawful writ, process, order, rule, decree, or command" of any federal district court "by doing any act * * * thereby forbidden to be done by him," if the act were "of such character

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[1] These sections originally constituted the so-called "Clayton * * * contempt [bill]." That bill, together with another bill, known as the "Clayton injunction * * * [bill]," had passed the House in the preceding (62d) Congress, but had failed of passage in the Senate. The substance of both these bills was, in the 63d Congress, added to the Clayton Anti-Trust bill, and the resulting measure was enacted as the Clayton Act. See H. Rept. No. 627, 63d Cong., 2d sess., pp. 21, 41-46; cf. Reyser's Note, last paragraph, to 18 U. S. C. 402. See also *infra*, pp. 30-35.

"as to constitute also a criminal offense" under any federal statute or any law of the state in which the act was committed, should "be proceeded against for his said contempt as hereinafter provided."

Section 22 prescribed (1) the procedure whereby such contempts were to be proceeded against and (2) the punishment therefor. The procedure consisted of issuance of a show cause order on affidavit or information, service thereof on the alleged contemnor, issuance of an attachment against the person of the accused in the event of his failure or refusal to make return to the rule to show cause, opportunity to the accused to purge himself before trial, and, most important of all (See *infra*, pp. 50-53), trial by jury if the accused should demand it (such trial to conform as nearly as possible to the usual practice in ordinary criminal cases). The punishment prescribed was "fine or imprisonment, or both, in the discretion of the court," with the *proviso*, among others, that "in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months."[1]

Section 23 contained further procedural provisions applicable to proceedings against persons accused of contempts of the type defined by Section 21, such as preservation of bills of exceptions, appeal, bail, etc.

Section 24, the section on which petitioners rely — provided that "nothing herein contained shall be con-

[1] Sections 21 and 22 are now, in substance, consolidated and codified as 18 U. S. C. 402, pars. 1 and 2, and 18 U. S. C. 3691, par. 1.

strued to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing."[18]

Section 25 provided a special one-year statute of limitations for contempts, and has no present relevance.

We submit that, viewed in the context in which it was enacted, Section 24 gives no support to, but on the contrary refutes, petitioners' argument. The natural meaning to be gathered from the section is that Congress intended to make it clear that the *procedural provisions set forth in Section 22*, and in particular the newly-guaranteed right to a jury trial, were to be limited to the special type of contempt defined in Section 21; that those provisions were not to be construed to relate to any of the types of contempt specifically described in Section 24; but that, on the contrary, these latter "and all other cases of contempt not specifically embraced within" Section 21 were to continue as in the past to "be punished" (*i. e.*, prosecuted or proceeded against) "in conformity to the usages at law and in equity now prevailing."

[18] Section 24 is now, in substance, codified as 18 U. S. C. 402, par. 3.

There is not the slightest suggestion in the language or context of Section 24 that Congress intended, in addition to preserving traditional procedures for punishing non-Section 21 contempts, to impose a maximum penalty for such contempts. This is particularly evident in light of the fact that Congress, virtually in the same breath, imposed just such a maximum for the particular type of contempt defined in Section 21.

(*b*) *Legislative history.*—As reported out of committee in the House, Sections 21-25 of the Clayton Act (as finally enacted) were numbered Sections 19-23, Section 24 of the Act being Section 22 of the bill (H. Rept. No. 627 to accompany H. R. 15657, 63d Cong., 2d sess., pp. 6-71. The committee report, after analyzing and explaining the first 14 sections of the bill (*id.*, pp. 7-21), which dealt with antitrust matters, stated (*id.*, p. 21; see also S. Rept. No. 698, 63d Cong., 2d sess., p. 18):

> The remaining sections of the bill, 15 to 23, inclusive, are substantially the same as the provisions of the two separate bills (H. R. 23635 and H. R. 22591, 62d Cong.), known as the Clayton injunction and contempt bills, which were considered and passed by the House of Representatives at the last Congress, but failed of passage in the Senate. *They deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the court.* The reports upon these bills made to the House in the last Congress are comprehensive and explain in detail their purpose, and for convenience are adopted as a part of this report * * *. [Emphasis added.]

The italicized language corroborates the view that the "prevailing usage" clause of Section 24 of the Act (Section 22 of the bill as reported out) was designed merely to preserve the previously existing *procedure* for punishing contempts of types other than that defined by Section 21 of the Act (Section 19 of the bill), and not, as petitioners argue, to freeze into law a "usage" as to punishment.

This conclusion is further corroborated by the House committee report which reported out the original bill containing the pertinent provisions (Sections 21-25) of the Clayton Act as finally enacted—that is to say, the "Clayton * * * contempt [bill]" (H. R. 22591, 62d Cong.). This bill proposed to amend the former Judicial Code (of 1911) by adding, immediately following Section 268 (now, in substance, 18 U. S. C. 401), five new sections, Sections 268a, 268b, 268c, 268d, and 268e. These proposed new sections were substantially identical with Sections 21-25 of the Clayton Act as finally enacted, Section 268d being the section corresponding to the Clayton Act's Section 24. The pertinent report (H. Rept. No. 613, 62d Cong., 2d sess.[*]) explained that "the most important provisions of the bill are contained in section 268b" (*id.*, p. 1), this being the section corresponding to Section 22 of the Clayton Act which proposed to guarantee a jury trial to the accused, at the latter's option, in "such cases of contempt

[*] This report (see *supra*, p. 30) is one of the two reports which, in the next Congress, were appended to H. Rept. No. 627, 63d Cong., 2d sess., accompanying the bill (H. R. 15657) which became the Clayton Act. It appears at pp. 11-51 of H. Rept. No. 627.

specified in section 268 as constitute a criminal offense under any statute of the United States or at common law." (*ibid.*). "Section 268d," the report further explains (*id.*, p. 2)—

> * * * excepts from the operation of the act contempts in the presence of the court, or so near thereto as to obstruct the administration of justice, and contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of or on behalf of the United States, and provides that in the excepted cases as well as in all other cases not specifically embraced within section 268a, the punishment shall be in conformity to the usages at law and in equity now prevailing.

"Thus it is seen," states the report (*ibid.*)—

> * * * that the bill applies and gives a jury trial, with the exception noted, in all proceedings for contempt wherein the acts alleged to have been committed constitute a criminal offense, either under any Federal statute or at common law. * * *

It clearly appears from these excerpts that the whole point and purport of the "prevailing usage" clause was to preserve, for all but the particular class of contempts defined by Section 268a (Section 21 of the Clayton Act), the previously existing *procedure* for punishing contempts (in particular, trial to the court without a jury)—and not, as petitioners claim, to fix a maximum penalty for such contempts.

Subsequent passages of the report further reinforce this conclusion. Replying to critics of the bill who claimed that it involved an unconstitutional "curtail[ment of] the power of the courts in the trial of contempts" (*id.*, p. 2), the report pointed out that it was in fact a far milder measure than the Act of March 2, 1831, c. 99, Section 1, 4 Stat. 487, which had substantively limited the contempt powers of the federal courts by "lopp[ing] off" some of the jurisdiction which at least one such court "had assumed and exercised" (*ibid.*). The bill under consideration, the report stated, "*only changes the procedure in contempt cases*" (*id.*, p. 4; emphasis added).

And, finally, summing up the effect of the proposed legislation on existing law, the report stated (*id.*, p. 6):

> The feature of the bill against which the most strenuous argument has been directed is that providing for jury trials. But no one has shown that such provision amounts to anything more than a change of procedure. So that *the question comes down to this, Has Congress or not the power to prescribe procedure?* * * *
> [Emphasis added.]

In accordance with the evidence that was available to the United States Congress concerning contempt in criminal contempt cases prior to the enactment of the Clayton Act

Basic to petitioners' "prevailing usage" argument is their assumption that, prior to the passage of the Clayton Act in 1914, "there was no reported case, federal or state, of a sentence in excess of one year * * * for contempt" (Br. 29). We have shown above

(pp. 44-53) that, even if this were so, it would be irrelevant, since Congress lent no purpose to refer[illegible] to "the usages at law and in equity [not] prevailing," to "freeze" a statutory maximum penalty into the federal law of contempt. The argument has other defects.

To begin with, there are at least two reported American cases, antedating the Clayton Act, in which a sentence in excess of one year was imposed for criminal contempt. *Hurley v. Commonwealth*, 188 Mass. 443, 74 N. E. 677 (1905) (18 months at hard labor);[1] *Pollard v. Commonwealth*, 30 Ky. L. Rep. 107, 97 S. W. 433 (1906) (two years' imprisonment).[2] Moreover, it is indisputable that there has never been a limitation on sentences for criminal contempt at common law. See quotation from Fox, *supra*, p. 41; Oswald, *Contempt of Court* (3d ed., 1911), chapter III.[3]

[1] While the court changed the trial court's designation of the place of confinement from the "house of correction" to a "jail," it did not otherwise alter the sentence imposed.

[2] It is true that this case (pursuant to Kentucky's statutory procedures) was tried to a jury. It is nonetheless opposed to petitioners' thesis that there was a settled and unvarying usage whereby the sanction for contempt was limited to one year's imprisonment.

[3] It is certain that in colonial America infamous punishments were imposed for contempt of court. See Hickley, *Legal Developments in Colonial Massachusetts, 1630-1686*, 37 Columbia Univ. Studies, No. 2, p. 110 ("requiring the culprit to stand an hour with one ear nailed to the pillory and then to be released by having it cut off"); Scott, *Criminal Law in Colonial Virginia* (1930), p. 173, n. (stocks); Chitwood, *Justice in Colonial Virginia* (1905), pp. 89-90 (lashes). As to the summary character of contempt proceedings in early America, see Goebel & Naughton, *Law Enforcement in Colonial New York* (1944), p. 605; *Case of Hummel and Bishoff*, 9 Watts 416, 421 (Pa., 1840); Quincy, Mass. Reports, 1761-1772, p. 245.

It is also significant that there is no evidence that the courts ever assumed that they were subject to any such limitation as petitioners would read into the past. Judge Hand observed below (R. 77): "There is no reason to suppose, because courts had not up to 1914 imposed imprisonment for more than a year, that they thought they had not the power to do so." The decisions, in fact, show that they thought the contrary—as one would, indeed, expect in light of the common law and in view of the fact that Congress, since the first Judiciary Act (1789), has used the term "discretion". For example, in *In re Henry*, 205 Fed. 626 (C. A. 9), decided the year before the adoption of the Clayton Act, the court observed (at 632):

> In the absence of a statute limiting the amount of a fine or the duration of imprisonment, the punishment is within the sound discretion of the court, having in view the ability of the offender to comply with the judgment of the court as to the amount of the fine.

Similarly, in *Carter* v. *Commonwealth*, 96 Va. 791, 811 (1899), the court, in discussing the power of courts of the United States to punish for contempt, noted that "* * * their discretion is without limit as to the amount of the fine or the duration of the imprisonment."

In *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646, decided within two years after the passage of the Clayton Act, a sentence to a year and a day for contempt was involved. State cases, including *Flannagan* v. *Jepson*,

177 Ia. 393, 158 N. W. 641,[2] upon which petitioners primarily rely (Br. 29), were urged on the court for the proposition that the sentence in question was beyond the power of the trial court. The Eighth Circuit, in rejecting this claimed limitation, stated (at 754-755):

> While we could, if we saw fit, point out many reasons why these cases are either unsound or inapplicable, suffice it to say that they do not attempt to pass upon the question of the power of a federal court to sentence to the penitentiary for contempt.

Certainly, this decision, following close upon the adoption of the Clayton Act, is persuasive evidence that the federal courts, like the English courts, have operated on the assumption that the only limitation is that imposed by sound discretion.

3. Furthermore, the "prevailing usage" clause was enacted into positive law in 1948; by that date, there had been numerous instances of federal contempt sentences exceeding one year.

Finally, even if the "prevailing usage" clause were pertinent to the issue of the power of a court to sentence for contempt to a term longer than a year (which we dispute), the *relevant* "prevailing usage" clause would not be that of the Clayton Act's Section 24 (which was repealed when the 1948 Criminal Code was enacted into positive law, see Act of June 25, 1948, c. 645, Section 21, 62 Stat. 683, 862, 864), but the comparable clause of 18 U. S. C. 402, par. 3 (see *infra*,

[2] The *Flannagan* case decided in 1916, held that no sentence in fact false (the actual sentence was one which could be imposed for contempt without violating the Sixth Amendment).

p. 83), which took effect in 1948. As of 1948, sentences in excess of one year had been imposed in numerous federal cases.[24] *E. g., Hill* v. *United States ex rel. Weiner*, 300 U. S. 105 (1937) (sentence of two years); *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646 (1916) (one year and a day); *Conley* v. *United States*, 59 F. 2d 929 (C. A. 8) (1932) (two years); *Warring* v. *Huff*, 122 F. 2d 641 (C. A. D. C.), certiorari denied, 314 U. S. 678 (1941) (one year and one month); *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136 (C. A. 7), certiorari denied, 322 U. S. 734 (1944) (one year and a day). And see *Dolan* v. *Commonwealth*, 304 Mass. 325, 23 N. E. 2d 904 (1939) (two and one-half years); *People ex rel. Rusch* v. *Montesano*, 293 Ill. App. 630, 12 N. E. 2d 915 (1938) (two years).

In the *Creekmore* case, *supra*, the court rejected, as follows, the contention that a sentence to a term of a year and a day in a federal penitentiary for criminal contempt was beyond the power of a court to impose:

> It is insisted that the court exceeded its power in sentencing the defendant to imprisonment in the penitentiary for the term of a year and a day. We have seen that the Judicial Code authorized the federal courts to punish by fine or imprisonment, at the discretion of the court, for contempt of their authority. There is nothing in the statute which limits

[24] As noted by Judge Hand in the opinion below (R. 77), all such sentences were, of course, invalid if petitioners' view as to the intended effect of the "prevailing usage" clause of the Clayton Act is correct.

where the imprisonment shall take place, except the discretion of the court. * * * It expressly declared that the length of imprisonment and its place should be in the discretion of the court. [237 Fed. at 752]

* * * * *

Assuming that criminal contempts are offenses in the meaning of this statute [former § 335 of the Criminal, now 18 U. S. C. 1, declaring offenses punishable by death or imprisonment for more than one year to be felonies], * * * we must either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the court in some mysterious way means that the discretion is limited to one year, without that thought being expressed. * * * We see no reason why, under Judicial Code, § 268 [now 18 U. S. C. 401], the court could not sentence a guilty party for a year and a day, and, if it had this power, then section 335 of the Criminal Code made it a felony. * * * [753–754]

* * * * *

* * * Is an order that a defendant in a criminal contempt case be imprisoned a year within the "discretion of the court" but a sentence for a year and a day beyond it? We have neither seen nor heard any argument which so convinces us * * *. [754] [25]

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[25] The same opinion also states (at 755):

The defendant has argued that, if a contempt be a felony and the defendant a convict, the provisions of the various amendments to the Constitution of the United States will protect him against a summary trial; but we have already

In the *Hall* case, *supra*, 300 U. S. 105, this Court unanimously sustained a two-year sentence imposed for contempt of an antitrust decree obtained by the United States. The validity of the sentence was challenged, although the ground was a claim of arbitrary discrimination (as between classes of contemnors) rather than an assertion that contempt sentences may never exceed a year.

Finally, since 1948, the courts have repeatedly sustained contempt sentences in excess of one year: *United States* v. *Hall*, 198 F. 2d 726 (C. A. 2), certiorari denied, 345 U. S. 905 (sentence of three years); *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841 (four years); *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916 (18 months); *Reich* v. *United States*, 239 F. 2d 134 (C. A. 1), certiorari denied, 352 U. S. 1004 (two years); *United States* v. *Brown*, not yet reported, C. A. 2, No. 24626, decided July 10, 1957, pending on petition for a writ of certiorari, No. 356, this Term (15 months); *United States* v. *Miranda*, not reported, S. D. N. Y., No. C 144-167 (three years); *United States* v. *Phillips*, not reported (W. D. Wash.), pend-

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pointed out in Merchants' Stock & Grain Co. v. Board of Trade of Chicago, supra, [201 Fed. 20] that this is not true. If there seems to be any conflict between declaring a criminal contempt a felony and then declaring that the defendant is not entitled to the protection of the amendments to the Constitution, the explanation is to be found in the announcement first made by Chief Justice Fuller in O'Neal v. United States, 190 U. S. 36, * * * and repeated in Bessette v. Conkey Co., 194 U. S. 324, * * * that "proceedings in contempt may be said to be sui generis."

ing on appeal to the Ninth Circuit, No. 14323 (three years).

In a number of other cases in which a sentence of more than one year was imposed, the cases were reversed on appeal. *Nilva* v. *United States*, 227 F. 2d 74 (C. A. 8), reversed, 352 U. S. 385 (sentence of a year and a day); *Pendergast* v. *United States*, 128 F. 2d 676 (C. A. 8), *reversed*, 317 U. S. 412 (two years); *Yates* v. *United States*, 107 F. Supp. 412 (S. D. Cal.), reversed, 227 F. 2d 848 (C. A. 9) (three years); *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1) (eighteen months); *Healey* v. *United States*, 186 F. 2d 164 (C. A. 9) (four contemnors who received sentences of a year or more.) In none of the cases, however, was reversal predicated on lack of authority in the sentencing court to impose a term of imprisonment of more than one year. In the *Nilva* case, *supra*, though the case was remanded by this Court for resentencing, the basis of remand was not lack of power to impose a sentence in excess of a year. Although the dissenting opinion in that case referred to numerous grounds which were thought sufficient to require setting aside of the conviction, there is no suggestion that the sentencing court exceeded its powers in imposing a sentence longer than a year.

C. RULE 7 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE HAS NO APPLICATION TO THE PRESENT CASE; THE PROCEDURE FOR CRIMINAL CONTEMPT IS GOVERNED BY RULE 42

Petitioners also contend (Pet. 9–10; Br. 33) that, since criminal contempt "is * * * an 'offense'" (Pet. 10), and since they were not prosecuted by indictment

(as required by Rule 7 (a) of the Federal Rules of Criminal Procedure in the case of all "offenses" punishable either by death or by imprisonment for a term exceeding one year or at hard labor (see *infra*, p. 87)), it follows that it was not permissible for the District Court to sentence them to imprisonment for more than one year. This is patently unsound.

Rule 7 (a) provides, so far as here pertinent, that "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment * * *. Any other offense may be prosecuted by indictment or by information." The Notes of the Advisory Committee on Rules explain that Rule 7 (a) "gives effect to" the Fifth Amendment's prohibition against holding any person to answer for a capital or otherwise infamous crime otherwise than by indictment by a grand jury. As we show, *infra*, pp. 63–76, however, criminal contempt is not and has never been considered within the purview of this provision of the Fifth Amendment. Therefore, Rule 7 (a), which "gives effect to" that provision, has no application to the procedures to be followed in the prosecution of criminal contempt.

Rule 42 (see *infra*, pp. 87–88), moreover, establishes the exclusive procedures to be followed in cases of criminal contempt. Rule 42 (a) authorizes "summary disposition" of the contempt where the contumacious act has been committed within the judge's sight or hearing and in his actual presence. Rule 42 (b), which, when enacted in 1948, substantially followed the provisions of existing law (see Note of the Ad-

visory Committee), provides for "Disposition Upon Notice and Hearing" in all other types of criminal contempt. Notice may be given orally in the presence of the defendant by the judge in open court, or by an order to show cause, or by an order of arrest. Rule 42 thus requires neither indictment nor information. When the Rule was adopted in 1948, there had been numerous federal cases of criminal contempt in which sentences of more than one year had been imposed.* *See supra*, p. 57. None of these cases had been prosecuted by indictment or information. If the draftsmen of Rule 42 had intended to make an exception to cover imprisonment-in-excess-of-one-year cases, they would hardly have remained silent. As it is, the Rule makes all criminal contempts punishable either by summary disposition or upon notice and hearing.

If petitioners' contention were carried to its logical conclusion, it is evident that Rule 42 would have no application to *any* case. Rule 7 (a) requires that those "offenses" which are not required to be prosecuted by indictment be prosecuted by information. If a criminal contempt is an "offense" within the purview of Rule 7 (a), but not one required to be prosecuted by indictment (because, as petitioners contend, the limit of punishment is one year), then it would follow that it would have to be prosecuted by information. In other words, if petitioners' basic premise be accepted, all criminal contempts would have to be prosecuted by indictment or information. But this would leave no room for Rule 42 or for the procedures expressly provided thereby. It is obvious,

therefore, that Rule 7 (a) has no application to criminal contempts and that Rule 42 means what it says.

D. THE POWER TO PUNISH CRIMINAL CONTEMPT BY A TERM OF IMPRISONMENT IN EXCESS OF ONE YEAR DOES NOT CONFLICT WITH THE REQUIREMENT OF THE FIFTH AMENDMENT THAT INFAMOUS CRIMES MUST BE PROSECUTED ONLY UPON INDICTMENT BY A GRAND JURY

Petitioners, finally, seek to support their construction of the "prevailing usage" clause of the Clayton Act (*supra*, pp. 44-60) and of Rule 7 (a) of the Federal Rules of Criminal Procedure (*supra*, pp. 60-63) on the ground that such construction would avoid adjudication of a constitutional question—namely, whether criminal contempt, if punishable by imprisonment for more than a year, is not an "infamous crime" within the meaning of the Fifth Amendment, and accordingly one which may be prosecuted only by indictment (Br. 37-40, 27; Pet. 14-16). The "Fifth Amendment" argument, spelled out, runs as follows:

An "infamous crime," within the meaning of the Fifth Amendment, is one punishable by imprisonment in a penitentiary, with or without hard labor. *Mackin* v. *United States*, 117 U. S. 348; *cf. Ex parte Wilson*, 114 U. S. 417. But, a crime, to be punishable by imprisonment in a penitentiary, must be one that is punishable by imprisonment for more than one year. 18 U. S. C. 4083.[*] Therefore, a crime that is punish-

[*] This statute requires not merely that an offense, to be punishable in a United States penitentiary, be punishable by imprisonment for more than a year but that the actual sentence imposed be for more than a year. Only with the consent of

able by imprisonment for more than a year is "infamous," and prosecution by indictment is constitutionally required.

The premise of the above argument is that contempt is a crime in the constitutional sense.[27] If that premise be sound (which we deny), the logic of petitioners' argument carries far indeed, for, in that event, the constitutional right of trial by jury applies equally. That right, conferred by Article III and by the Sixth Amendment, does not extend to felonies alone. Assuredly, it covers most misdemeanors, the only exceptions being those which come within the narrow category of "petty offenses".[28] *District of Columbia* v. *Clawans*, 300 U. S. 617, 623-630. This would mean, at a minimum, that the innumerable criminal contempt cases involving imposition of substantial fines (*e. g.*, *United States* v. *United Mine Workers*, 330 U. S. 258 ($700,000 upon the union; $10,000 upon defendant Lewis)) or imprisonment for

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the defendant, may a sentence for "an offense punishable by imprisonment for a year or less be served in a penitentiary."

[27] On the subject of contempts, the Constitution is silent. Moreover, so far as we have been able to ascertain, the subject was not raised at the Constitutional Convention, at the ratifying conventions of the states, or at the time of the adoption and ratification of the Bill of Rights.

[28] The test of "petty offense" suggested by the *Clawans* case is that the moral quality of the act must be relatively inoffensive and the maximum penalty relatively minor. 18 U. S. C. 1 (3) now defines as a petty offense "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." It has been held that, even though petty offenses may be tried without a jury, Congress must first specifically provide that there shall be no jury. *Smith* v. *United States*, 128 F. 2d 990 (C. A. 5).

more than six months (*e. g., Savin, Petitioner*, 131 U. S. 267 (one year)), were proceedings conducted in disregard of constitutional rights."

I. Petitioners' premise ignores the historically unique status of the offense of criminal contempt. Contempts have never been classed in this country, as in the case of other types of criminal offenses, as either "felonies" or "misdemeanors"; they have always been regarded as *sui generis*. *O'Neal* v. *United States*, 190 U. S. 36, 38; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326; *Myers* v. *United States*, 264 U. S. 95, 103; *Blackmer* v. *United States*, 284 U. S. 421, 440; *Cockmore* v. *United States*, 237 Fed. 743, 755 (C. A. 8), certiorari denied, 242 U. S. 646; *Warring* v. *Huff*, 122 F. 2d 641 (C. A. D. C.), certiorari denied, 314 U. S. 678.[28]

A contemnor has never enjoyed the full bundle of constitutional rights ordinarily enjoyed by one charged with a "crime". "[C]ontempt proceedings are *sui generis* and should be treated as such in their practical incidence. They are not to be circumscribed

[28] Penalty aside, many contempts involve some degree of moral dereliction. Cf. *District of Columbia* v. *Colts*, 282 U. S. 63, 73, where the crime of reckless driving was subject to a fine of $100 and imprisonment of not more than thirty days, yet the Court held that jury trial was required since the offense was "*malum in se*."

[29] In the *Warring* case, Judge (later Chief Justice) Vinson stated aptly at 641: "* * * we see no advantage in rehashing the discussions on whether criminal contempt is *sui generis*, offense, crime, or felony. Criminal contempts are criminal contempts: some of the procedural and substantive law applied to criminal contempts is as though they were crimes; and some of it is not."

by procedural formalities, or by traditional limitations of what are ordinarily called crimes, except insofar as due process of law and the other standards of decency and fairness in the administration of federal justice may require." *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 609 (dissenting opinion of Mr. Justice Frankfurter).[31] In particular, the constitutional strictures "as to modes of accusation and methods of trial" have never been deemed binding in contempt cases in this country. *Ex parte Hudgings*, 249 U. S. 378, 383. This has been so, historically, because the courts have recognized that the power of summary punishment is essential to their self-preservation, so that they can "restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power." *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419.

"While contempt may be an offense against the law and subject to appropriate punishment," this Court declared in *Myers v. United States*, *supra*, 264 U. S. at 104–105, and repeated in *Blackmer v. United States*, *supra*, 284 U. S. at 440, "certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding."[32] Accordingly, trial of contempts by the courts does not violate Article III, Section 2, clause 3 of the Constitu-

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[31] The proposition stated in the quotation was not a point of disagreement with the Court's majority.

[32] It is notable that this categorical statement reflected, in both instances, the opinion of a unanimous Court.

tion (*infra*, p. 82), declaring that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," or the provision of the Sixth Amendment (*infra*, p. 82) guaranteeing to the accused in "all criminal prosecutions" the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed." *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 489; *In re Debs*, 158 U. S. 564, 594-596. "[T]he power of a court to make an order," as this Court observed in the *Debs* case, *supra*, "carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court" (158 U. S. at 594).

On this same issue—the question of the right to a trial by jury in a contempt proceeding—Chief Judge Cranch, in *Ex parte Burr*, 4 Fed. Cas. 791, 797 (C. C., Dist. of Col.), observed:

> By the literal construction of the constitution, all crimes, (except in cases of impeachment), even those committed in the land and naval service, must be tried by jury; yet, in practice, these are tried by courts-martial, without a jury. But whatever may be the law as to cases arising in the land and naval service,

[20] The few instances in which a contemnor charged with disobedience of a court order is entitled to a jury trial are the products of statute. *E. g.*, Sections 21-22 of the Clayton Act (now 18 U. S. C. 402) (see *supra*, pp. 44-53); Section 11 of the Norris-LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 72; now 18 U. S. C. 3692); Public Law 85-315, Section 151, enacted September 9, 1957.

cases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment. From time immemorial the courts of England, and from the first settlement of this country the courts here have claimed and exercised the power to punish contempts in a summary manner. * * * Such being the universal practice and sentiment upon the subject, it cannot be supposed that the makers of the constitution meant to include it in the number of crimes entitled to trial by jury; and that they did not may be fairly argued from the constructive exposition of the clause of the constitution given by the first congress which sat under its authority. Many members of the convention were members of the first congress, and it cannot be believed that they would have silently acquiesced in so palpable a violation of the then recent constitution, as would have been contained in the seventeenth section of the judiciary act of 1789 (1 Stat. 73),—which authorizes all the courts of the United States "to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same,"—if their construction of the constitution had been that which has, in this case, been contended for at the bar.[*]

[*] Judge Cranch's views on this subject are, perhaps, entitled to particular weight since he took his place on the federal bench (a position which he occupied with distinction for some fifty-four years) in the very early days of the Republic (1801).

By the same token, and because of the same considerations, a contempt is not, and has never been, considered, a "crime" within the meaning of the Fifth Amendment. "In brief," as this Court said in *In re Debs*, *supra*, "a court enforcing obedience to its orders by proceedings for contempt, is not executing 'the criminal laws of the land * * *'" (158 U. S. at 596). Rather, it is protecting the integrity of its own processes and orders. *Eilenbecker* v. *Plymouth County*, *supra*, 134 U. S. at 36. "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *In re Debs*, *supra*, 158 U. S. at 595. See also *Michaelson* v. *United States*, 266 U. S. 42, 65–67. This rationale is no less applicable to a grand jury than a petit jury. Yet, as Judge Hand points out in the opinion below (R. 70), the necessary consequence of adopting petitioners' view would be the anomaly that contempt proceedings, if the punishment may exceed a year's imprisonment, must be begun by a grand jury, although such proceedings need not be tried to a petit jury. The difficulties inherent in such a result—both logical and practical—demonstrate the lack of merit in the constitutional innovation suggested by petitioners.

2. Petitioners argue, however, that the admittedly settled rule holding criminal contempts not to be "criminal prosecutions" within the jury-trial requirement of the Sixth Amendment "rests on an historical error," and that "the consequences of the error should not be extended to other constitutional guarantees" (Br. 38).

But this claim of historical error, *in the generalized form in which petitioners state it*, is, itself, erroneous. While there is basis for saying that constructive contempts (*e. g.*, libels upon the court) committed by strangers to a proceeding were not tried to the court in early (pre-eighteenth century) times, it appears that disobedience of the writs and orders of the King's courts (as, also, contempts in the face of the court and contempts by officers of the court) were punishable, from an early date, without indictment or jury trial.

As authority for their statement that the power of a court to punish criminal contempt without according the accused a jury trial is based on "historical error," petitioners cite (Br. 38, fn. 46) *The History of Contempt of Court* (1927), the noted study by Sir John Charles Fox, and an article by Mr. Justice (then Professor) Frankfurter and Professor Landis entitled *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010 (1924), in the course of which latter work the authors summarize (at pp. 1042–1047) Fox's findings as previously developed in a series of essays which appeared in the *Law Quarterly Review*.[35] In the cited work

[35] See *The King* v. *Almon* (in two Parts), 24 Law Q. Rev. 184, 266 (1908); *The Summary Process to Punish Contempt* (in two Parts), 25 Law Q. Rev. 238, 354 (1909); *Eccentricities of the Law of Contempt of Court*, 36 Law. Q. Rev. 394 (1920); *The Nature of Contempt of Court*, 37 Law Q. Rev. 191 (1921); *The Practice in Contempt of Court Cases*, 38 Law Q. Rev. 185 (1922); *The Writ of Attachment*, 40 Law Q. Rev. 43 (1924). Fox's subsequent work, *The History of Contempt of Court* (1927), to which peti-

of Fox (see also his *The King* v. *Almon* (in two Parts), 24 Law Q. Rev. 184, 266 (1908)), that author demonstrates, by means of a painstaking review of early English authorities, that a statement by Mr. Justice Wilmot, in the draft of an undelivered opinion in *The King* v. *Almon* (1765),[35] to the effect that the issuance of "attachments" by which was meant conviction "upon examination without a trial by jury" (see Fox's *History* at p. 56)—"by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law" (*id.*, p. 8), was historically inaccurate, in that prior to about 1721 such contempts were tried in England in the "ordinary course of law," *i. e.*, "after trial by a jury" (*id.*, *passim*, especially pp. 26–27, 39, 49–50, 53–54, 116–117). Notwithstanding the lack of historical basis for Wilmot's broad generalization, as Fox points out, beginning in 1821, when it was cited in *Rex* v. *Clement*, 4 Barn. & Ald. 218, it "became the law of the land, and it was confirmed and estab-

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tioners refer (Br. 38, fn. 46), is, as he explains in the Preface (p. vii), "founded to some extent upon" these articles.

[35] The case involved an attachment for criminal contempt against John Almon, a bookseller, for publishing a libel against Lord Chief Justice Mansfield. Shortly before the judgment in favor of granting the attachment (which implied conviction without a jury trial; see Fox, *op. cit.*, p. 56) was about to be delivered, a defect in the style of the action was discovered, and the proceeding under the particular rule *nisi* had to be abandoned. Thereafter, a change of ministry ensuing, the proceeding was abandoned permanently. The undelivered opinion of Mr. Justice Wilmot was published some thirty-seven years later, in 1802, after the Justice's death, by his son as part of a compilation of the Justice's writings, known as Wilmot's *Notes* (Fox, *op. cit.*, pp. 5–6).

lished by a line of succeeding cases extending down to the present century" (Fox, *op. cit.*, pp. 28–29).

Fox makes clear in his writings, however, that his conclusions as to Wilmot's "historical error" do not apply to all classes of contempt, but, on the contrary, to certain types only, particularly those "committed by strangers out of court or in the presence, but not in the actual view, of the Court," and, even more especially, such so-called "constructive contempts" as libelous publications criticizing courts or judges (*op. cit.*, pp. 42, 116–117). "All contempts committed in the actual view of the Court," on the other hand, "and contempts by officers of justice, whether committed in or out of court, were tried summarily by the Court without a jury" (*id.*, p. 116).[37] Cf. Frankfurter and Landis, *op. cit. supra*, 37 Harv. L. Rev. at 1042. And, more important for present purposes, Fox indicates that the *direct disobedience of court process or orders*—the kind of contempt involved in the instant

[37] Fox acknowledges that there were instances at very early common law of "contempts committed in the face of the Court" which were "dealt with according to the course of the common law by impanelling a jury *instanter*," but disputes the conclusion of Solly-Flood, another historian of the subject, that "the punishment by summary process of contempt committed by a stranger *in facie* was not resorted to till long after the death of Henry IV" (*op. cit.*, p. 50). "Although these cases prove that some contempts *in facie* were punished in the ordinary course of law," Fox observes, "they do not by themselves disprove the existence of the power to punish certain contempts of this nature summarily. I think that Solly-Flood's contention goes too far, and that where the contempt was committed in the actual view of the Court, the Court committed summarily * * *" (*ibid.*).

case—had been summarily punishable from early times. See *id.*, *passim*, particularly pp. 7, 36, 108–110; compare Beale, quoted *supra*, pp. 32–33. In *The King v. Almon* (Part I), 24 Law Q. Rev. 184, 188 (1908), he states: "There can be no question that obedience to the King's writ was enforced by attachment from time immemorial, and in later times this remedy was extended to enforce a rule of the Court." [28] In Part II of the same article (24 Law Q. Rev. at 276–277), he observes that "[o]riginally the superior courts of common law had jurisdiction to punish disobedience to the King's writ summarily by fine and imprisonment upon attachment, and probably also a disciplinary jurisdiction over their own officers exercisable summarily"; and that the lower common law courts gradually established a summary contempt jurisdiction "in or after the Tudor period," though "this did not extend to libels on the Court or judges which were still punished by indictment or by proceedings in the Star Chamber." Wilmot's error (*id.*, pp. 277–278) was "in supposing that a summary process was originally applied otherwise than to enforce the King's writs or to preserve discipline amongst the officers of the Court."

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[28] A footnote to this sentence cites a seventeenth century case which applied the writ of attachment to enforce an award of arbitration.

Compare the observation of this Court in the *Debs* case (quoted at p. 67, *supra*): "[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the *inquiry as to the question of disobedience has been, from time immemorial, the special function of the court.*" (158 U. S. at 594; emphasis added.)

Thus, at least with respect to the kind of contempt involved at bar—disobedience of court process or orders by a party to the proceeding—there is no basis in fact for the suggestion that punishment by the court itself, without the intervention of a jury, was an eighteenth century innovation in English law."

Wilmot's error—his thesis that immemorial usage (and not merely eighteenth century practice) gave foundation for the trial of constructive contempts by the court—is not a live question in the federal courts; the Act of 1831, as interpreted in *Nye* v. *United States*, 313 U. S. 33, 49, put it beyond the judicial power to

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[39] Of course, even if the "error" of Mr. Justice Wilmot had in fact affected contempts consisting of disobedience of court orders (which, as we have shown, it did not), the fact could hardly be relevant. As noted in Frankfurter and Landis, *op. cit., supra*, 37 Harv. L. Rev. at 1046, note 128, "there is ample evidence that, as a result of private communication between Wilmot and Blackstone, Wilmot's views of 1765 found their way, 'both in phrase and matter,' into the fourth volume of the famous Commentaries published in 1769 (4 BL. COMM., c. 20, § III), and, through them, potently affected the current of Anglo-American law [citing Fox, *The Summary Process to Punish Contempt*, 25 Law Q. Rev. 238, 247, 253-254 (*k*); see also his *History*, at pp. 18, 21]. Blackstone becomes the great reliance for 'immemorial usage' in English and American opinions, until Wilmot himself appears in print. As the amazing circulation of the Commentaries in the Colonies and the early American reports show, Blackstone had an 'overshadowing influence in the construction of American law,' I Hammond, BL. COMM., viii-x. Our law of contempt thus decisively derives from Wilmot *via* Blackstone." In short, since it is certain that the framers of the Constitution were thoroughly conversant with Blackstone, his views and statements are an accurate measure of their understanding of the status of contempt proceedings.

punish as a contempt an obstruction of justice taking place outside the immediate vicinity of the court." But the same Act of 1831, like its successors, fully preserves the power to punish as a contempt the disobedience of court process and orders. This power, we submit, has historical support not only in the

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* By this interpretation, the Court achieved what may fairly be described as the central thesis of Fox's work. Note Fox's criticism of the earlier *Toledo Newspaper* decision, overruled on this point by *Nye*, *History*, *op. cit.*, p. 211, *et seq.* Fox himself, it should be observed, did not suppose that a similar change in England could come about without an act of Parliament, since the practice of trying constructive contempts to the court, even though not based on immemorial usage, was established more than two hundred years ago. Thus, he states (*The Summary Process to Punish Contempt (Part II)*, 25 Law. Q. Rev. 354, 371) "that Parliament alone can effect an alteration."

In fact, Parliament has not done what Congress did. Contempts by publication and other forms of constructive contempt are still punishable by attachment of the offender and hearing before a judge. For recent illustrations, see the opinions of Lord Goddard, C. J., in *Regina* v. *Evening Standard Co.*, 1 All E. R. 1026 (Q. B., 1954) and *Rex* v. *Bolam*, 93 Sol. J. 220 (K. B., 1949) (imposing a three months' sentence upon the editor and a £10,000 fine upon the proprietors of the *Daily Mirror*). Wilful disobedience of a court order is, of course, triable in the same manner. "Disobedience by witnesses or parties to lawful orders of a superior Court of record may be dealt with by the Court summarily by committal or attachment for contempt of Court." 1 Russell, *Law of Crimes* (7th ed., 1910) 512. This is not to say that there is no alternate mode of proceeding in England. There is concurrent jurisdiction to try as indictable offenses most acts which also constitute contempt. Thus, "[d]isobedience to orders of Courts of record is punishable on indictment as a misdemeanor, but is usually dealt with summarily as for contempt." Archbold, *Criminal Pleading, Evidence and Practice* (31st ed., 1913), pp. 1212. And see *id.*, pp. 1206–1208; 8 Halsbury, *Laws of England* (3rd ed., 1954) : 3–4.

eighteenth century practice known to the framers, but also in the practice at early common law.

IV

PETITIONERS' SENTENCES OF THREE YEARS' IMPRISONMENT WERE NOT EXCESSIVE IN THE LIGHT OF THEIR DELIBERATE AND CONTINUED DEFIANCE OF THE AUTHORITY OF THE COURT FOR MORE THAN FOUR YEARS.

Petitioners' remaining contention (Br. 40–41)—that the trial court abused its discretion in sentencing them to terms of imprisonment for three years—is likewise without merit.

Unlike the judgment in a civil contempt proceeding, where the conditional fine or period of incarceration is imposed merely to coerce compliance with the court's mandate, a sentence for criminal contempt is punitive in nature and is imposed for the purpose of vindicating the authority of the court. *United States* v. *United Mine Workers*, 330 U. S. 258, 302. Protection of the integrity of the judicial process requires that one who deliberately defies the authority of a court be punished proportionately to the gravity and duration of his calculated resistance to that authority.[41]

Mr. Justice Lamar, in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, expressed the rationale of punishment for criminal contempt when he said, "If a party can make himself a judge of the validity of

[41] "It is not the right of the courts only, but it is the right of the people, to cause their courts to be treated with respect. It is the public interest, and not the personal pride of the judges * * * which claims this power for the courts." *Ex parte Burr*, 4 Fed. Cas. 791, 797 (C. C., Dist. of Col.).

orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery" (at 450). This observation fits the present case. After taking advantage of every procedural remedy and every avenue of appeal permitted defendants accused of crime under our system of jurisprudence, and after their convictions had been sustained after full hearing by this Court, petitioners elected to take the law into their own hands and to ignore the final order that they surrender to start serving their sentences. Petitioners' conduct in absconding and remaining in flagrant violation of the order to surrender for commitment for over four years clearly required punishment which would effectively demonstrate that such efforts to make a mockery of the judicial process would not be tolerated.

This Court has held that the trial court, in imposing sentence for a criminal contempt, may properly take into consideration the extent of the wilful defiance of the court's order, the seriousness of the consequences of the contumacious behavior, and the importance of deterring such acts in the future. *United States* v. *United Mine Workers, supra,* 330 U. S. at 303. "Because of the nature of these standards," as the Court further remarked, "great reliance must be placed upon the discretion of the trial judge" (*ibid.*).

In *Huffman* v. *United States,* 148 F. 2d 943, 944 (C. A. 10), the court, commenting on the provisions of the Criminal Code which make criminal contempt

punishable by fine or imprisonment in the court's discretion, correctly noted: "There is nothing in the statute [now 18 U. S. C. 401] which limits the punishment, except the reasonable discretion of the court. And since the matter rests in the sound judicial discretion of the court, an order imposing punishment on a contemnor will not be disturbed on appeal for being unreasonable unless the discretion has been grossly abused".[42]

Comparison to other cases of criminal contempt in which defendants were sentenced to imprisonment for two years or longer discloses no instance of wilful disobedience more flagrant and persistent. In *Hill* v. *United States ex rel. Weiner*, 300 U. S. 105, a two-year sentence was imposed for violation of an injunction issued under the Sherman Act. In *Reich* v. *United States*, 239 F. 2d 134 (C. A. 1), certiorari denied, 352 U. S. 1004, there was a similar sentence for contempt of an injunction issued under the Federal Food, Drug, and Cosmetic Act.[43] In *Conley* v. *United States*, 59 F. 2d 929 (C. A. 8), a two-year term was sustained against a defendant who offered to "fix" a criminal case and procure its dismissal. In the unreported case of *United States* v. *Miranda*, S. D. N. Y., No. C144–167, a three-year sentence was imposed for refusal to answer questions of the court.

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[42] See also *In re Sobel*, 242 Fed. 487, 489 (C. A. 2); *Miller* v. *Zaharias*, 168 F. 2d 1, 3 (C. A. 7); *MacInnis* v. *United States*, 191 F. 2d 157 (C. A. 9).

[43] In that case, the finding of violation was by a jury, pursuant to the defendant's demand for such trial under Section 302 (b) of the Act (21 U. S. C. 332 (b)).

In *United States* v. *Phillips*, also unreported (W. D. Wash.), pending on appeal to the Ninth Circuit (No. 14323), a three-year sentence was imposed against a witness for refusing to answer questions on cross-examination. In *Yates* v. *United States*, 107 F. Supp. 412 (S. D. Cal.), reversed on other grounds, 227 F. 2d 848 (C. A. 9), another three-year sentence was imposed, likewise for refusing to answer questions on cross-examination. In *Pendergast* v. *United States*, 128 F. 2d 676 (C. A. 8), reversed on other grounds, 317 U. S. 412, a two-year sentence was imposed for using political influence and bribery to affect the outcome of litigation. And in *United States* v. *Pontillo*, S. D. N. Y., No. C151–113, a four-year sentence was imposed against a defendant who, after receiving a reduction in sentence on his promise to cooperate in another case, refused to testify."

Petitioners, by their own statements, showed that their flight was motivated by a desire to show resistance and to publicize their cause. After remaining in hiding and in open defiance of the courts for more than four years, they apparently determined that the time for surrender was propitious (*supra*, pp. 8–11). And when they did surrender, they did not do so in any spirit of contrition. On the contrary, they an-

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"This sentence was vacated shortly thereafter when the defendant changed his mind and testified.

To the list of cases cited in the preceding paragraph of the text, one may add the case of two witnesses who were recently sentenced in the Southern District of New York to five years each for refusing to testify at the trial of John Dioguardi. See *New York Times*, May 21, 1957, p. 1, col. 5; May 25, 1957, p. 1, col. 2.

nounced their surrender to the press in advance, using the occasion to renew their attacks on the courts which had convicted them. We submit that, in the light of all of these circumstances, petitioners' conduct was of such a nature, and lasted for such an extended period, that the three-year sentences which they received were within the allowable discretion of the District Court.

Congress, in 1954, enacted a statute which made bail-jumping a statutory offense.[48] Under that Act, where the defendant who jumps bail has been charged with a felony, or where he is on bail pending appeal after conviction of any offense, penalties of up to a $5,000 fine, or five years' imprisonment, or both, are authorized. Since the statute was designed to apply to just such situations as that here involved, irrespective of whether the absconder was specifically aware of an order requiring him to surrender, the penalty imposed here can hardly be deemed excessive under these statutory standards.

In *United States* v. *Hall, supra,* 198 F. 2d 726, and *United States* v. *Thompson, supra,* 214 F. 2d 545, certiorari denied, 348 U. S. 841, the defendants violated the same court order which petitioners violated. Hall was a fugitive for only three months before he was apprehended, yet the three-year sentence there imposed was not deemed to be beyond the court's proper discretion. Thompson remained at large for twenty-six months before being captured, and a four-year term was sustained as likewise within the per-

[48] 18 U. S. C. 3146, added by the Act of August 20, 1954, c. 772, Section 1, 68 Stat. 747 (see *infra*, pp. 83–84).

missible scope of the court's discretion. An attempt is made here to distinguish petitioners' cases from those of Hall and Thompson on the ground that, whereas the latter were apprehended, petitioners surrendered (Br. 41). In light of the duration of the contempt of the petitioners and the circumstances surrounding its ultimate termination, this effort is unpersuasive.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1957.

APPENDIX

Article III, Section 2, clause 3 of the Constitution provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

18 U. S. C. 401 provides:

> *§ 401. Power of court.*
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 402 provides:

> *§ 402. Contempts constituting crimes.*
>
> Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the Dis-

trict of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title* and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

18 U. S. C. 3146, added by the Act of August 20, 1954, c. 772, § 1, 68 Stat. 747 (see 18 U. S. C., Supp. IV), provides:

§ 3146. Jumping bail.

Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to sur-

*Section 3691 provides for a jury trial (at the accused's option) for acts of contempt of the kind described in Section 402.

render himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

The Act of October 15, 1914, c. 323, 38 Stat. 730, 738–740 (popularly known as the Clayton Act), provided in pertinent part:

* * * * *

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may

issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however*, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment,

or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

* * * * * *

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

* * * * * *

Rule 7 (a) of the Federal Rules of Criminal Procedure provides:

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * * * *

Rule 42 of the Federal Rules of Criminal Procedure provides:

RULE 42. CRIMINAL CONTEMPT

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court

for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge; that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 100

GILBERT GREEN and HENRY WINSTON,

Petitioners,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. The Insufficiency of the Evidence.

In our principal brief, we showed that petitioners' convictions cannot be sustained on the theory that they had actual knowledge of the order of July 2, 1951 because there was no evidence of such knowledge (Pet. Br., 12-14).[1] We further showed that the convictions cannot be sustained on the alternative theory that petitioners had notice of the order of July 2 by virtue of knowledge that an application for the order would be made. We demonstrated that the latter theory is fallacious because (1) petitioners were not charged with notice of the order but with actual knowledge of its existence; (2) there was no evidence that petitioners knew that application for the order would be made, and

[1] We designate the brief for petitioners "Pet. Br." and the brief for the United States "Resp. Br."

(3) knowledge that an order will be applied for cannot support a conviction for criminal contempt of the order after it is entered (Pet. Br., 14-20).[2]

Respondent makes a disingenuous attempt to obscure the issues by thoroughly confusing its discussion of these alternative theories of guilt and arguing as though there were no distinction in fact or law between knowledge of the existence of an order and notice of an order arising from knowledge that it will be applied for.[3] When respondent's discussion of the two theories is disentangled, it becomes apparent that it cannot offer a rational defense of either of them.

A. The knowledge theory.

Respondent contends that the following circumstances establish, beyond a reasonable doubt, that petitioners had actual knowledge of the order of July 2: (1) Petitioners knew, in consequence of the affirmance of their convictions, that their commitment was imminent. (2) They knew that application would be made on July 2 for an order that they

[2] We also showed that the convictions cannot be sustained on the theory that the contempts lay in petitioners' disobedience of an order (presumably made on June 29) for their appearance in court on July 2 (Pet. Br., 20-21). Further discussion of this theory is unnecessary since respondent does not defend it.

[3] The caption to respondent's point I asserts that the evidence supports a finding that petitioners had "notice" of the order (Resp. Br., 22). But the first paragraph of the text states that the evidence showed that petitioners "were well aware of the existence of the order" (*ibid.*). The argument that follows does not discriminate between knowledge and notice. It concludes by reasserting that "petitioners knew of the existence of the order for their surrender" (Resp. Br., 27). But respondent supports this assertion with a quotation from *United States* v. *Hall*, 198 F. 2d 726, holding that Hall was chargeable with *notice* of the order of July 2 because the evidence was sufficient to establish that he had knowledge that the order would be applied for (Resp. Br., 27-28).

surrender on that day.[4] (3) They knew that they were required to appear in court on July 2. (4) They knew that they were fugitives from justice. (5) They must have known that their bail would be terminated (Resp. Br., 22-24).

Respondent says that the foregoing circumstances compel the conclusion that petitioners knew "that the order which they had every reason in the world to expect had in fact been issued" (Resp. Br., 24). It also says that petitioners "knew, on June 29, 1951, that the entry of such an order was * * * both certain and imminent" (Resp. Br., 27). Thus, respondent's argument comes down to the proposition that petitioners had actual knowledge that the order of July 2 had been issued because, prior to that date, they knew with certainty that it would be issued.

Obviously, however, petitioners could not have *known* that the order for their surrender existed before the order was issued. Accordingly, it is impossible to prove that they had knowledge of the existence of the order by evidence of what they knew prior to the time of its issuance. Respondent's argument, therefore, is based on a logical absurdity.

Another flaw in respondent's reasoning is revealed by the concession, elsewhere in its brief, that the *Dennis* defendants appear to be the only persons in the whole of Anglo-American jurisprudence against whom a surrender order was entered after they had absconded (Resp. Br., 33-34, 36-37). Accordingly, nothing in the events prior to July 2 could possibly have conveyed to petitioners knowledge that the court would invoke this unique procedure which had never occurred to generations of astute judges and prosecutors. On the contrary, petitioners "had every reason in the world to expect" that on July 2 they would be treated like all other absconders—*i.e.*, that their bail would be forfeited and bench warrants

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[4] As we later show (*infra*, p. 5), there is no evidence that petitioners had knowledge that this application would be made

issued for their arrest. Had that been the case, petitioners' flight, as respondent concedes, could not have been a contempt (Resp. Br., 37).

Furthermore, it necessarily follows from respondent's argument that petitioners had knowledge of the existence of the order upon its issuance on July 2. Yet respondent makes no such claim. It asserts only that petitioners must have learned of the order "at some point during the prolonged period that they were in hiding" (Resp. Br., 24). But respondent does not cite any evidence (and there is none) of occurrences subsequent to July 2 which informed petitioners that an order for their surrender had been issued. Respondent seeks to fill this void in the evidence by proposing that the Court take judicial notice of newspaper reports of the entry of the order (*ibid.*, ftn. 2). Respondent, of course, means to imply that the convictions should be sustained on the basis of "judicial notice" that petitioners read these reports. This is the best that respondent can offer as satisfying its burden of proof of knowledge beyond a reasonable doubt.

B. The notice theory.

1. As our principal brief demonstrated, the proposition that a conviction for contempt of an order may be based on knowledge that the order would be applied for is contrary to the authorities and violative of due process (Pet. Br., 17-20). Respondent makes no reply to our constitutional argument. It quotes the passage from *Pettibone* v. *United States*, 148 U. S. 197, upon which the Court in *Hall* relied (Resp. Br., 26). But it does not attempt to answer our demonstration that the Court did not intend its dictum to apply to criminal contempts. *In re Lennon*, 166 U. S. 548, 554, cited by respondent (Resp. Br., 27), confirms our analysis of *Pettibone*. For it flatly holds that "actual notice" of an order is prerequisite to a conviction for criminal contempt.

Respondent also relies (Resp. Br., 25) on the statement in 2 Daniell, *Chancery Pleading and Practice* (4th Amer. ed.), quoted in our principal brief (p. 17) that, "if the party remains in court until the order is about to be made, he cannot, by leaving at that instant, avoid its consequences." The statement is plainly inapplicable. Petitioners were not "in court" on July 2 when "the order was about to be made," nor did they flee "at that instant."[5]

2. As we showed in our principal brief (pp. 22-23), there was no evidence that petitioners knew that an application for a surrender order would be made, and the trial judge made no finding that they had such knowledge. Respondent asserts that petitioners "were being kept advised of developments in their case by the Dennis attorneys, Messrs. Sacher and Isserman" (Resp. Br., 22). However, as respondent's citation to its statement of the case discloses (Resp. Br., 6-7), the attorneys did not advise their clients of the "development" in question, but only that their presence in court on July 2 was required. Respondent relies on a statement by Mr. Isserman that on June 29 he and Mr. Sacher discussed the illegality of the notice of settlement of the surrender order. Respondent implies that the discussion took place in Green's presence (Resp. Br., 23). But that is not the fact. It is plain from Mr. Isserman's statement (R. 10; Resp. Br., 6) that he did not see Green until later the same day, when he received the assurance that Green would appear on July 2.[6]

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[5] Respondent also cites *Radio Corp. v. Cable Radio Tube Corp.*, 66 F. 2d 778, and other authorities holding that a contemnor may be convicted for violating an order, *knowing that it has been pronounced*, before the order has been drawn up, signed or served (Resp. Br., 25, ftn. 3, 26-27). This principle is obviously inapplicable.

[6] Respondent is also in error in stating (Resp. Br., 23) that the United States Attorney refused a request by Mr. Sacher to postpone the application for the surrender order until after July 4. As appears from respondent's statement of the case (Resp. Br., 5), Mr. Sacher made no such request. What he requested was that the proposed date for the surrender of the defendants be postponed until after the holiday.

3. Having no answer to our contention that since petitioners were charged with actual knowledge of the order of July 2, their convictions cannot be sustained on a different theory of guilt (Pet. Br., 16-17), respondent chooses to ignore it.

It is true that if contempt is an appropriate remedy for disobedience of a surrender order, then absconders reap an advantage by fleeing before the order is issued instead of awaiting its entry. That defect in the law has now been remedied by the enactment of 18 U. S. C. 3146. Certainly, the defect cannot be cured, as in this case, by ignoring the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the guarantees of due process.

II. The Lack of Jurisdiction to Punish Disobedience of the Surrender Order as a Contempt.

Our principal brief contended: (1) that disobedience of an order for the appearance or surrender of a defendant enlarged on bail was not regarded as a contempt at common law; (2) that such disobedience was, therefore, not punishable as a contempt under section 17 of the Judiciary Act of 1789; (3) that neither the Act of March 2, 1831 nor 18 U. S. C. 401 enlarged the categories of orders for disobedience of which the contempt power may be invoked, and (4) that disobedience of a surrender order is, therefore, not punishable as a contempt under 18 U. S. C. 401 (Pet. Br., 22-25).

Respondent concedes that there was no instance in the whole course of the common law or, indeed, prior to the decision in *Hall* of a contempt prosecution for violation of an order for the appearance or surrender of a bailed defendant (Resp. Br., 33-34).[5] It also concedes that the con-

[5] Respondent agrees that the common law proceeded against absconders by a "process of outlawry" and points out that the same process was employed in this country (Resp. Br., 37, ftn. 7).

tempt power under section 17 of the Judiciary Act of 1789 was co-extensive with the common law power (Resp. Br., 30). It insists, however, that 18 U. S. C. 401 makes disobedience of *any* lawful order a contempt (Resp. Br., 28-29). But respondent does not even attempt a reply to our analysis of the text of 18 U. S. C. 401 and its legislative history, both of which demonstrate that the section does not extend the contempt power to order-disobedience of a kind which was not punishable as a contempt under the first Judiciary Act (Pet. Br., 23-24).

Respondent reviews at length the legislative history of the Act of March 2, 1831 to show that the Act did not *restrict* the common law power of the courts to punish order-disobedience (Resp. Br., 29-32). Of course it did not do so. But the relevant point about the 1831 Act (in which the reference to order-disobedience first appeared) is that it did not *enlarge* the classes of orders for disobedience of which the contempt power could be invoked at common law and under the first Judiciary Act (Pet. Br., 23-24). And respondent has conceded that there is no substantial difference between the Act of 1831 and 18 U. S. C. 401. See, Supplemental Brief for the United States on Reargument, p. 9, ftn. 14, in *Brown* v. *United States*, No. 43, this Term.

Respondent urges that there is no significant difference between disobedience of a subpoena and disobedience of an order for the appearance or surrender of a bailed defendant, and that since the contempt power is available in the first case, it should extend to the second (Resp. Br., 35-36).

Respondent is wrong, historically and logically. The crucial historical difference between the two forms of disobedience is that the first was punished as a contempt at common law,* while the second was not.** The crucial

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* See Resp. Br., 33, ftn. 4.

** Nor has it ever been punished as a contempt except in the cases of the four *Dennis* fugitives.

logical difference between the two is that contempt was and remains the *only* remedy for violation of a subpoena,[10] while there have always been and are other means of vindicating the authority of the court against absconders—i.e., outlawry (until it fell into disuse), forfeiture of bail, and arrest. Accordingly, there is no foundation in necessity for the unprecedented use of the contempt power against the *Dennis* fugitives (see Pet. Br., 25-26).

III. The Invalidity of the Sentences.

A. We urged that the conclusion that infamous punishment may not be imposed for contempt finds support in the language of 18 U. S. C. 401 and its predecessors (Pet. Br., 28-29). Respondent argues that the phrase "at its discretion" is unambiguous and vests the courts with plenary power over the character of the sentence (Resp. Br., 40-44).[11]

Respondent states that "at its discretion" answers the question, "How long a term of imprisonment?" (Resp. Br., 42). The relevant question, however, is not the length of imprisonment, but its *character*—i.e., whether it involves infamous punishment. When the reference to "discretion" was written into the Act of 1789, there was no statute which determined the character of a sentence by reference to its

---

[10] In the absence of a criminal statute

[11] Respondent is in error in stating that the punishment provisions of section 17 of the Judiciary Act of 1789 and its successors were "merely the expression by Congress of the accepted common-law view as to the power of a court to punish contempt" (Resp. Br., 41). For, as respondent points out, a contempt was punishable at common law by both fine *and* imprisonment, while the contempt statutes authorize only fine or imprisonment for the same contempt (Resp. Br., 41, 42).

length. The antecedent to 18 U. S. C. 4083 was not enacted until many years later (see Pet. Br., 27, ftn. 29). Hence, in historical context, the phrase "at its discretion" does not answer the question, "What kind of punishment?"[41] Under the rule of strict construction, therefore, the punishment may not be infamous.

Furthermore, respondent fails to consider the incongruities which its construction of the contempt statutes involves or to discuss the state court decisions which, if correct, require a contrary result (see Pet. Br., 28-29). Nor does respondent attempt to explain the lack of any instance of infamous punishment for contempt during the century and a quarter that followed enactment of the first Judiciary Act (see Pet. Br., 29, 35).[42]

[41] At the time of the enactment of the first Judiciary Act, it was not the place of confinement but other incidents of the sentence, such as hard labor, the pillory, or disqualification from office, which determined the infamous character of the punishment. It was not until 1885 that the Court held that "at the present day" imprisonment in a penitentiary without hard labor is an infamous punishment *Mackin v. United States*, 117 U. S. 348, 352; *United States v. Moreland*, 258 U. S. 433, 448. For a discussion of the origin of the concept of "infamous crimes," see Franklin, *Infamy and Constitutional Liberties*, 14 Lawyers Guild Rev. 1, and *The Encyclopedists' Origin and Meaning of the Fifth Amendment*, 15 *loc. cit.*, 41.

[42] The two state court cases cited by respondent (Resp. Br., 54) are not exceptions. In *Hurley v. Commonwealth*, 188 Mass. 443, the court amended the sentence by changing the place of confinement from the house of correction to a jail. It thereby dispensed with the requirement of hard labor as is evident from the statement (at 448) that "in the absence of any statute, it has been held that imprisonment at hard labor is illegal." Having thus eliminated the infamous features of the punishment, the court stated (*ibid.*) that it became unnecessary to pass on the contention that contempt may not constitutionally be punished as an infamous offense. Accordingly, the decision appears to support our construction of 18 U. S. C. 401. In *Feltner v. Commonwealth*, 30 Ky. L. Rep. 107, 97 S. W. 433, the imprisonment was in the county jail, not a penitentiary. Moreover, the court regarded contempt as a misdemeanor, not a

B. Our principal brief demonstrated that the function of the prevailing usage clause of section 24 of the Clayton Act was to codify the undeviating practice of punishing contempts as offenses not infamous (Pet. Br., 30-31, 35-36). Respondent complains that this was a circuitous way for Congress to fix the character (and hence the maximum term) of imprisonment for contempt (Resp. Br., 46). Respondent's argument is that because the prevailing usage clause uses "circumlocutionary language" (*ibid.*) it should be disregarded entirely. For respondent insists that the sole purpose of section 24 was to confine the jury trial and maximum sentence provisions of section 22 to the type of contempt defined in section 21. But, as we showed, this purpose was fully accomplished by the first clause of section 24 (Pet. Br., 30). Hence, respondent's reading of section 24 makes the prevailing usage clause redundant (see Pet. Br., 36). Moreover, respondent ignores the purpose which animated the contempt provisons of the Clayton Act (see Pet. Br., 35-36).

Respondent relies on the statement in a committee report that sections 21-24 of the Clayton Act "deal entirely with questions of Federal procedure relating to injunctions and contempts committed without the presence of the

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felony. These facts appear from the opinion in the companion case, *French* v. *Commonwealth*, 147 S. W. 427. Later in its brief (Resp. Br., 57), respondent cites two state court decisions subsequent to 1914 affirming contempt sentences of more than one year. But *Dolan* v. *Commonwealth*, 304 Mass. 325, did not involve infamous punishment since the confinement was to a common jail. And in *People* v. *Montesano*, 293 Ill. App. 630, it does not appear from the abstract of the decision or from the reporter's headnote (12 N. E. 2d 915) whether the sentence was to a jail or a penitentiary. Thus, respondent's research confirms our statement (Pet. Br., 33) that there has never been a single reported instance of infamous punishment for contempt in the state courts.

court" (Resp. Br., 50).[13] This statement is entirely consistent with our construction of the prevailing usage clause. For the clause did not "deal with" — i.e., change — the procedure for punishment of contempts excluded from the provisions of section 22. On the contrary, it required adherence to the procedure which had previously prevailed.[14]

Respondent states that the controlling statute is no longer section 24 of the Clayton Act but its 1948 codification in 18 U. S. C. 402 (Resp. Br., 56). Respondent does not indicate the materiality of that fact, and it has none. Respondent tacitly concedes that the codification did not change the substance or effect of the original enactment (see Pet. Br., 31-32). It cites five cases of infamous punishment for contempt, decided between 1916 and 1948 (Resp. Br., 57). But since none of these cases considered the effect of the prevailing usage clause, the rule that re-enactment of a statute incorporates prior judicial interpretations of its provisions is inapplicable.

C. Our principal brief urged that contempt may not be punished as an infamous offense because Criminal Rule 7 requires all infamous offenses (felonies) to be prosecuted by indictment (Pet. Br., 33). Respondent points out that

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[13] It is obvious that this and the other committee reports cited by respondent (Resp. Br., 50-53) use the term "procedure" to designate a limitation on sentence as well as the requirement of a jury trial. For section 22 modifies the prior "procedure" in both of these aspects.

[14] Respondent also argues that decisions prior to 1914 indicate that the courts thought that they had unlimited discretion over the duration of imprisonment for contempt (Resp. Br., 55). It cites observations in two cases in support of this contention. In one, the sentence was a $500 fine. *In re Maney*, 205 Fed. 629. In the other, the sentence was a $25 fine and two days in jail. *Carter v. Commonwealth*, 96 Va. 791.

under Rule 7 offenses not infamous (misdemeanors) *may* be prosecuted by indictment or information, while under Rule 42 contempts are not prosecuted by either method. Hence, it is argued, the term "offense" in Rule 7 cannot embrace contempts because, if it did, the Rule would exclude their prosecution by the modes specified in Rule 42 (Resp. Br., 61-62). However, respondent overlooks the fact that the provision of Rule 7 for prosecution of misdemeanors by indictment or information is *permissive* and, therefore, does not exclude other modes of prosecution of an offense (in this case, contempt) as to which the Rules make specific provision.

D. Respondent devotes thirteen pages (Resp. Br., 63-76) to its contention that the imposition of infamous punishment for contempt does not raise a substantial constitutional question under the requirement of the Fifth Amendment that infamous crimes shall be prosecuted by indictment. It cites a number of cases in which the Court has stated that criminal contempt has always been regarded as *sui generis*. But at best, this label [13] merely states the problem; it provides no solution.

Despite the confusion which clouds the thinking about criminal contempts, three propositions may be stated with assurance. First, the Court has held that they are not *sui generis* with respect to many constitutional and statutory provisions for the protection of those accused of crime (see Pet. Br., 38, ftn. 45). Second, the Court has never had occasion to decide whether contempt may constitutionally

[13] Judge Hand characterized it as "a favorite evasion" (R. 76).

be punished as an infamous crime.[18] Third, a decision that the Fifth Amendment bars infamous punishment for contempts has not been foreclosed by the holding that they need not, constitutionally, be tried to a jury (see Pet. Br., 39).

Respondent contends that Lord Wilmot's statement concerning the "immemorial usage" of prosecuting contempts summarily was not erroneous with respect to contempts involving disobedience of the King's writ (Resp. Br., 72-73). Be that as it may, both history and experience furnish ample support for the statement of Mr. Justice Holmes (in a case involving order-disobedience) that:

> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure,

[18] The observation in *Ex parte Hudgings*, 249 U. S. 378, 383 (Resp. Br., 66) that contempt "is not controlled by the limitations of the Constitution as to modes of accusation" was dictum. Moreover, it was confined to "contempt committed in the presence of the court." The observation in *In re Debs*, 158 U. S. 564, 594 (Resp. Br., 67) that in contempt cases "the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court" was likewise dictum as it was intended to apply to the mode of accusation. Moreover, at most, the Court indicated that criminal contempts are prosecuted without indictment, and not that they are subject to infamous punishment. The statement in *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 335, that "a proceeding in contempt cannot be considered as an infamous crime" is ambiguous. For it is unclear whether the Court believed that criminal contempt is not a "crime," or thought that, although a "crime," it is not subject to infamous punishment. It would appear that the Court was of the latter view since what it decided was that criminal contempts were "criminal cases" within the Court of Appeals Act.

3 Transactions of the Royal Historical Society, N. S. p. 147 (1885) * * * "[17] *Gompers* v. *United States*, 233 U. S. 604, 610-11.

And it has been said that this statement in a "landmark" contempt case presages that "the Supreme Court is not likely to embalm exploded history in the Constitution." Frankfurter and Landis, *Power of Congress Over Procedure in the "Inferior" Federal Courts—A Study in the Separation of Powers*, 37 Harv. L. Rev., 1010, 1011-12.

Plainly, the constitutional question presented by the sentence in this case is substantial. The interpretation of 18 U. S. C. 401, 18 U. S. C. 402 and Criminal Rule 7 for which we contend should therefore be adopted. For, "So to interpret is in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U. S. 41, 47.

Respectfully submitted,

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[17] The citation is to the statement of Solly-Flood that "no instance whatever has yet been found * * * of any committal *in penam* by the Court of King's Bench in a summary manner, and without indictment, presentment, information, or arraignment for contempt, committed even in its presence, up to a considerable period after the death of Henry IV." Fox believed that Solly-Flood erred in not excepting contempts committed by officers of justice or in the actual view (as distinguished from the "presence") of the court. See, Fox, *The History of Contempt of Court* (1927), pp. ix, 50.